87-1200

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY;
BOARD OF TRUSTEES OF ALABAMA A & M UNIVERSITY;
JOHN KNIGHT, et al.; and
NORMALITE ASSOCIATION, et al.,

Petitioners,

v.

AUBURN UNIVERSITY; et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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January 19, 1988

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7090

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

JOHN F. KNIGHT, JR., et al., individually and on behalf of others similarly situated,
Plaintiffs-Intervenors-Appellees,

VS.

THE STATE OF ALABAMA;
GEORGE C. WALLACE, Governor of the State of Alabama;
THE ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY;
THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, State Superintendent of Education;
AUBURN UNIVERSITY, a public corporation;
THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation;
TROY STATE UNIVERSITY, a public corporation,
Defendants-Appellants,

BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY, a public corporation;
THE BOARD OF TRUSTEES FOR ALABAMA A & M UNIVERSITY, a public corporation,
Defendants.

Appeal from the United States District Court for the Northern District of Alabama.

[Filed October 6, 1987]

OPINION

Before VANCE and KRAVITCH, Circuit Judges, and BROWN,* Senior Circuit Judge.

PER CURIAM:

I. INTRODUCTION

This case presents claims of racial discrimination in the State of Alabama's system of public higher education. Complaints filed by the United States and a class representing students, graduates, faculty and staff at Alabama State University allege that defendants have failed to take affirmative steps to remove the vestiges of the dual system of higher education that resulted from the State's past policy of racial segregation. The nature of the claims—calling for an analysis of the racial character of public higher education in Alabama since the first public college was organized in 1831—raises a number of difficult and novel questions. Similarly, the nature of the relief sought—including a demand for increased funding and the transfer of programs to the historically black public universities—poses serious problems. By its very nature, this case cries out for a solution reached among the parties themselves. The United States, State of Alabama, Governor of Alabama, Alabama State Board of Education, the governing boards of the ten public universities, and the concerned members of these educational communities are surely in

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* Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

the best position to resolve the important issues this case presents for the future of higher education in Alabama. Their failure of leadership, however, leaves by default the responsibility with the courts. Faced with claims that the defendant institutions have engaged in racially discriminatory practices, the judicial system must examine plaintiffs' claims and, if meritorious, vindicate the constitutional and statutory rights of black Alabamians.

II. BACKGROUND

A. The Complaint of the United States

In January 1981, the United States Department of Education notified the Governor of Alabama of its finding that there remained vestiges of a prior, racially dual system of higher education in Alabama in violation of title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d. Title VI prohibits discrimination on the basis of race in federally assisted programs. After unsuccessful negotiations over a statewide remedial plan, the Department of Education referred the matter to the Department of Justice pursuant to 42 U.S.C. § 2000d-1.

The United States filed this action on July 11, 1983. The complaint named as defendants the State of Alabama, its Governor, the Superintendent of Education, the State Board of Education, the Alabama Commission on Higher Education, the Alabama Public School and College Authority, and ten public colleges and universities. The complaint charges violations of title VI and the fourteenth amendment of the United States Constitution. According to the United States, prior to 1953 the defendants had "established and maintained a racially dual system of public higher education." The complaint alleged that the enrollment of students and hiring of faculty at all schools in Alabama had been segregated by state law or by policy and practice. The complaint also contended that the two historically black schools, Alabama State University

("ASU") and Alabama A & M University ("A & M"), were continually given less financial support than the white institutions.

The United States alleged that the defendants have perpetuated that racially dual system. The complaint charged that since 1953, the defendants have continued to pursue policies and practices that have resulted in a public higher education system in which the institutions' student bodies, faculties, and governing boards are still substantially segregated by race. The United States requested that defendants be required to develop and implement plans eliminating the vestiges of this racially dual system of public higher education.

B. The Complaint of the Knight Intervenors

In January 1981, John F. Knight, Jr., and others described as students, graduates, faculty and employees of Alabama State University ("Knight intervenors"), filed an action under 42 U.S.C. §§ 1981 and 1983 in the United States District Court for the Middle District of Alabama. They claimed that the continued existence of vestiges of past racial segregation in public higher education in the Montgomery area violated title VI and the fourteenth amendment. These plaintiffs complained of the duplication of the programs at ASU, an historically black institution, by two predominantly white institutions, Auburn University at Montgomery and Troy State University at Montgomery. They argued that the State had failed to carry out its duty to dismantle the dual system of higher education in Montgomery. Their complaint sought merger of these two white institutions into ASU.

On September 15, 1983, the named plaintiffs in Knight v. Wallace moved to intervene in the present action on the ground that its outcome would be determinative of the issues in their case. The district court granted the motion to intervene and certified them as representatives for a class including graduates of ASU; black adults or minor

children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions.[1]

C. The District Court's Ruling

After extensive discovery and numerous pre-trial motions,[2] a month-long trial took place before Judge U.W. Clemon in July 1985.[3] On December 9, 1985, the district court issued its memorandum opinion, 628 F.Supp. 1137, which held that the state had never fully eliminated the vestiges of its prior, racially dual system of higher education. The lengthy opinion began by discussing the historical development of the dual system of higher education. The court examined the history of each public college in Alabama up to 1965 and found that the colleges were segregated by law and by custom. The court found that during this period black schools were given far less state funding than white colleges. The court also described how "[t]he Board of Education and State of Alabama took various actions which had the effect of stymieing the growth and development of both Alabama A & M and Alabama State College [ASU]."

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[1] The district court also realigned A & M and ASU as plaintiffs and permitted these institutions to assert claims under title VI and the fourteenth amendment. In a previous appeal growing out of this lawsuit, this court held that ASU and A & M were instrumentalities of the State and,as such, lacked standing to assert these claims. United States v. Alabama, 791 F.2d 1450 (11th Cir.1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987). Consequently, the realignment of A & M and ASU as plaintiffs was improper.

[2] One such motion was defendants' attempt to have Judge Clemon disqualified from the case. For a discussion of the lower court's handling of this motion, see infra part III, B, 1.

[3] Prior to and during the trial, the United States entered into consent decrees with Livingston University, Jacksonville State University, the University of Montevallo, and the University of South Alabama.

The opinion then reviewed the status of each institution of higher education in Alabama in the period between 1965 and 1975 and listed a series of actions undertaken by defendants which continued the racially dual system. The court found that the expansion of the University of Alabama at Huntsville into a full degree-granting institution and the course duplication of Athens State—Calhoun Community College interfered with A & M's ability to recruit white students and faculty. The court also noted that the development of the Montgomery campuses of Auburn University and Troy State University served to duplicate ASU's programs and thus had a negative impact on white enrollment at ASU. In addition, the opinion found that the State's allocation of funds and programs further reinforced ASU and A & M's historical status as second class black institutions.

The court then made detailed findings as to the vestiges of the prior, racially dual system that presently exist in Alabama's institutions of higher education. The opinion examined the student enrollment, faculty employment, and governing boards at each institution. The court found that the student bodies at Auburn, Auburn University at Montgomery, University of Alabama at Huntsville and Athens State College, in addition to those at ASU and A & M, remained identifiable by race. The court also found that the faculties and governing boards of all the institutions were racially identifiable. The district court made a thorough examination of the various policies and programs at each institution that contribute to perpetuating this racially dual system. The court also studied the distribution of funding and program offerings between the traditionally black and white institutions and found that they served to maintain vestiges of past discrimination. The district court rejected defendants challenge to the standing and "systems-wide" approach of plaintiffs and concluded "that the State has not dismantled the dual system of higher education."

The district court ordered the State, the Governor, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority to submit a remedial plan consistent with its findings to "eliminate all vestiges of the dual system." Defendants filed notices of appeal and moved for a stay. On February 14, 1986, this court stayed all further district court proceedings pending disposition of this appeal.[4]

III. ISSUES

On appeal, defendants assert a broad array of error. These claims of error are of two types. Defendants raise a number of threshold issues, contesting whether the trial judge can properly sit on the case and the right of the plaintiffs to bring these claims. Secondly, defendants challenge the district court's decision on the merits, arguing that the factual findings are clearly erroneous and that the lower court applied incorrect legal standards. As a consequence of our rulings on the threshold issues, however, we do not reach the merits of the district court's decision.

A. Appealability

The first issue that this court must address is plaintiffs' contention that the district court's opinion is not an appealable final order.

Plaintiffs argue that the opinion below cannot be a "final order" under 28 U.S.C. § 1291 because the district court has required that a remedial plan still be submitted for adoption by the court. They maintain that no final order exists until the district court actually promulgates its remedial plan. Plaintiffs, however, subscribe to an overly literal view of what constitutes a final order. The Supreme

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[4] Pursuant to the district court's order, several defendants filed their proposed remedial plans on February 14, 1986. This court, however, stayed all district court proceedings on that date.

Court has rejected such a formalistic approach to appealability, noting that " 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case."[5] As Chief Justice Warren wrote for the Court in *Brown Shoe Co. v. United States:*

> The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered "final." A pragmatic approach to the question of finality has been considered essential to the achievement of the "just, speedy, and inexpensive determination of every action". . . .[6]

The district court's 99-page opinion in this case is for all practical purposes a final order. In its specificity, detail, and comprehensiveness, the opinion resolves every issue before the court. The district judge leaves defendants with little flexibility in drafting a remedial order consistent "with the findings and the . . . reasonable inferences . . . flowing from the court's memorandum of opinion." The opinion clearly spells out the offending policies and practices which must be abolished. The district court gives

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[5] Gillespie v. United States Steel Corp., 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949)); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 722 n. 28, 94 S.Ct. 2006, 2022, n. 28, 40 L.Ed.2d 476 (1974).

[6] 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed.2d 510 (1962) (footnotes omitted). See also *Bradley v. School Bd. of Richmond*, 416 U.S. at 722 n. 28, 94 S.Ct. at 2022 n. 28 ("This Court has been inclined to follow a 'pragmatic approach' to the question of finality.") (citing *Brown Shoe Co.*, 370 U.S. at 306, 82 S.Ct. at 1513); *Gillespie v. United States Steel Corp.*, 379 U.S. at 152, 85 S.Ct. at 311 ("[T]his Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' ") (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. at 546, 69 S.Ct. at 1225); *Freeman v. Califano*, 574 F.2d 264, 267 (5th Cir.1978) ("This Court has long followed the flexible, practical approach to finality."). See also Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L.Rev. 89 (1975).

detailed instructions in every area, from the finding that sixteen evening extension courses at Calhoun Community College "needlessly duplicat[e]" evening courses offered by A & M, to the finding that Auburn University's requirement of a minimum ACT score of 18 has an improper disparate impact on black enrollment, to the finding that the faculty at the University of Alabama and Auburn University were paid an average of 28% more than faculty at ASU and A & M. We thus conclude that the decree of the district court in this case possesses sufficient indicia of finality to support an appeal under 28 U.S.C. § 1291.[7]

Our decision follows the reasoning of this court's predecessor in *Morales v. Turman.*[8] Morales brought a class action attacking the constitutionality of the practices and policies of the Texas juvenile correction system. The district court held that the Texas system had failed to achieve the minimum standards demanded by the constitution. Appellees argued that this ruling was not appealable "because the judge withheld issuance of permanent injunctive relief pending submission of a comprehensive plan to be drawn up by the parties."[9] Although conceding that "some flexibility was left to the parties in determining precisely how compliance with the minimum standards would be structured," this court's predecessor determined that the district court's opinion satisfied the "practical" test for finality established by the Supreme Court. The *Morales* court noted that the detailed minimum standards set out by the district court were not "mere guidelines subject to

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[7] *See Brown Shoe Co.*, 370 U.S. at 308, 82 S.Ct. at 1514; *cf. Mahaley v. Cuyahoga Metro. Hous. Auth.*, 500 F.2d 1087 (6th Cir.1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 781, 42 L.Ed.2d 805 (1975); *Thoms v. Heffernan*, 473 F.2d 478 (2d Cir.1973), vacated on other grounds, 418 U.S. 908, 94 S.Ct. 3199, 41 L.Ed.2d 1154 (1974)

[8] 535 F.2d 864 (5th Cir.1976), *rev'd on other grounds*, 430 U.S. 322, 97 S.Ct. 1189, 51 L.Ed.2d 368 (1977).

[9] 535 F.2d at 867 n. 6.

further negotiation by the parties," but instead, "constitute[d] a final adjudication determining the minimal content that must be given to the 'right of treatment' as it applies to virtually every aspect of [the Texas system's] operations."[10] As such, the district court's opinion was a final decision properly appealable under 28 U.S.C. § 1291. Other appeals courts have interpreted § 1291 in a similar fashion and held lower court opinions to be appealable where the opinions are sufficiently detailed, even though a remedial plan had yet to be adopted.[11]

Plaintiffs rely heavily on *Taylor v. Board of Education of New Rochelle*,[12] citing this case as definitively ruling that a district court opinion finding racial discrimination and ordering authorities to propose a remedial plan is not appealable. It is true that "[a] district court order requiring submission of a plan, without more, is not appealable."[13]

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[10] Id.

[11] *See, e.g., Mahaley v. Cuyahoga Metro. Hous. Auth.*, 500 F.2d 1087, 1090 n. 3 (6th Cir. 1974) (ruling requiring preparation of plan to provide non-discriminatory, low cost housing held to be appealable final order), cert. denied, 419 U.S. 1108, 95 S.Ct. 781, 42 L.Ed.2d 805 (1975); *Board of Educ. of Oklahoma City Pub. Schools v. Dowell*, 375 F.2d 158 (10th Cir.) (ruling requiring defendants to submit a school desegregation plan consistent with detailed report of an expert panel considered to be appealable), *cert. denied*, 387 U.S. 931, 87 S.Ct. 2054, 18 L.Ed.2d 993 (1967). *Cf. Brown Shoe Co.*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (opinion finding a violation of antitrust statutes and ordering divestiture held appealable, despite leaving to further order how divestiture would be accomplished); Frederick L. v. Thomas, 557 F.2d 373 (3d Cir.1977) (opinion requiring defendants to submit plan to identify all learning disabled children was appealable under § 1292(a)); *Board of Pub. Instruction v. Braxton*, 326 F.2d 616 (5th Cir.) (opinion requiring defendants to submit school desegregation plan was injunction sufficiently detailed to be appealable under § 1292(a)), *cert. denied*, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1964).

[12] 288 F.2d 600 (2d Cir.), *cert. denied*, 368 U.S. 940, 82 S.Ct. 382, 7 L.Ed.2d 339 (1961).

[13] *Liddell v. Board of Educ. of St. Louis*, 693 F.2d 721, 723 (8th Cir.1981) (and cases cited therein).

The *Taylor* court followed this general rule in dismissing an appeal from an order directing the school board to submit a desegregation plan. Yet as Judge Friendly, the author of *Taylor*, noted in a later case, there exist "two situations in which the normally non-appealable order to submit a plan may be appealable: when the order contains other injunctive relief, or when the content of the plan to be submitted has already been substantially prescribed by the district court."[14] In *Taylor*, neither of these two exceptions applied since the lower court's determination "that a remedial plan must be submitted provided only a skeletal outline for later adjudication."[15] The facts of the instant case compel a different result, however. A review of the opinion below demonstrates that Judge Clemon has already "substantially prescribed" the remedial plan.[16] Therefore the issues before this court are fixed, and the present appeal is not premature.[17]

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[14] *Spates v. Manson*, 619 F.2d 204, 209 (2d Cir.1980).

[15] *Id.* (quoting *Frederick L. v. Thomas*, 557 F.2d 373, 380-81 (3d Cir.1977)).

[16] A strong argument could also be made that the lower court's opinion in this case is an injunction appealable pursuant to § 1292(a) because it compels the preparation of a plan dealing expressly with a detailed list of acts. *See Board of Pub. Instruction v. Braxton*, 326 F.2d 616 (5th Cir.), *cert. denied*, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1964); *Frederick L. v. Thomas*, 557 F.2d 373 (3d Cir.1977).

[17] A pre-implementation order, however, may also be reviewable as "final." Although a pre-implementation order adjudging liability but leaving the quantum of relief for subsequent determination is normally non-final and non-appealable, this general rule does not always hold in institutional civil rights litigation. District court orders establishing violations frequently specify minimum legal standards that serve as a blueprint for remedy implementation. Where the standards are specific, most issues can be resolved by immediate review and the danger of piecemeal appellate review is minimal.

Note, *The Remedial Process in Institutional Reform Litigation*, 78 Colum.L.Rev. 784, 846 (1978) (footnotes omitted).

B. The Disqualification Issue

1. Procedural Background

Appellants argue that the lower court erred in not disqualifying Judge Clemon from deciding this case. Before reaching the substance of this claim, however, we outline the complicated procedural history of this issue.

On September 6, 1983, Auburn University moved to disqualify Judge Clemon pursuant to 28 U.S.C. §§ 144 and 455. Three days later, the State Superintendent of Education Wayne Teague filed a similar motion. These motions were accompanied by affidavits, signed by the respective attorneys for these parties, setting forth various facts in support of the motions. Judge Clemon denied the recusal motions. The judge ruled that the affidavits did not meet the technical requirements of 28 U.S.C. § 144 since they were not executed by a party and that a reasonable person, viewing the true facts, would not harbor doubts concerning his impartiality. Auburn then filed a petition for a writ of mandamus. A panel of this court held that a later affidavit executed by the President of Auburn University met the technical requirements of 28 U.S.C. § 144 and remanded with directions that another judge be assigned to hear the recusal motion.[18]

Senior District Judge Hobart Grooms was assigned the recusal proceedings, held a hearing and received evidence in the matter. On December 19, 1983, Judge Grooms issued an order granting the motions to disqualify Judge Clemon. Judge Grooms concluded that Judge Clemon's involvement as a counsel of record in *Lee v. Macon County Board of Education* gave him "personal knowledge of disputed evidentiary fact." Judge Grooms also concluded that Judge Clemon's personal and political relationship with former Senator Stewart, then attorney of record for defendant Alabama A & M, raised the appearance of bias.

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[18] *In re: Auburn University*, No. 83-7557 (11th Cir. Nov. 10, 1983).

On January 19, 1984, however, Judge Grooms vacated his order and recused himself.[19] Senior Circuit Judge David Dyer then heard defendants' disqualification motions and denied the motions. Judge Dyer found no evidence that Judge Clemon's association with former Senator Stewart would affect the judge's impartiality and concluded that the affidavits did not connect Judge Clemon's involvement in *Lee v. Macon* to any aspect of the present case. Judge Dyer also denied Auburn's request to certify the issue for interlocutory appeal under 28 U.S.C. § 1292(b). As a result, Judge Clemon presided over and decided this non-jury case.

2. Legal Standard

"The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system."[20] To ensure that the courts remain above reproach, the Congress passed statutory provisions governing the disqualification of federal judges. The relevant statutes are 28 U.S.C. §§ 144 and 455.[21] These two statutes control appellants' claim that

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[19] Appellants imply that Judge Grooms was pressured to recuse himself by harsh public criticism attributed to Judge Clemon by the media. They argue that these statements are clear evidence of the trial judge's personal bias against them. We do not find it necessary to reach this issue.

[20] *United States v. Columbia Broadcasting Sys.*, 497 F.2d 107, 109 (5th Cir.1974).

[21] 28 U.S.C. § 144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party

the lower court erred in failing to disqualify Judge Clemon from presiding over this case.[22]

Disqualification under § 144 requires that a party file an affidavit demonstrating the judge's personal bias or

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may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455 provides, in pertinent part:
(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) Is to the judge's knowledge likely to be a material witness

prejudice against that party or in favor of an adverse party. The statute mandates that the affidavit be filed within a specified time period and that it be accompanied by a certificate of good faith by a counsel of record. If an affidavit is timely and technically correct, the trial judge may not pass upon the truthfulness of the facts stated in the affidavit even when the court knows these allegations to be false. The statute restricts the trial judge to determining whether the facts alleged are legally sufficient to require recusal.[23] The test for legal sufficiency adopted by this Court requires a party to show:

1. The facts are material and stated with particularity;

2. The facts are such that, if true they would convince a reasonable person that a bias exists.

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in the proceeding.

* * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

[22] The right to a fair trial before an impartial judge is a basic requirement of due process and thus guaranteed by the United States Constitution. However, because the statutory grounds for disqualification are stricter than the requirements of due process, it is not necessary to address the constitutional dimensions of disqualification. *See* Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 U.Kan.L.Rev. 255, 255(1982) (hereinafter *Statutory Disqualification*).

[23] United States v. Serrano, 607 F.2d 1145, 1150 (5th Cir.1979), *cert. denied*, 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980); *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1051 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). *See also Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921) (construing a predecessor statute).

3. The facts show that the bias is personal, as opposed to judicial, in nature.[24]

In 1974, Congress rewrote 28 U.S.C. § 455 to correct perceived problems in the disqualification statutes. Prior to 1974, both the technical and legal sufficiency requirements of § 144 had been construed strictly in favor of judges.[25] Courts also operated under the so-called "duty to sit" doctrine which required a judge to hear a case unless a clear demonstration of extrajudicial bias or prejudice was made.[26] Consequently, disqualification of a judge was difficult under § 144. In passing the amended 28 U.S.C. § 455, Congress broadened the grounds and loosened the procedure for disqualification in the federal courts. Although a party still is permitted to make a motion and submit affidavits to bring about a judge's disqualification, the statute places a judge under a self-enforcing obligation to recuse himself where the proper legal grounds exist.[27] The statute also did away with the "duty to sit"[28] so the benefit of the doubt is now to be resolved in favor of recusal. Section 455(a) requires a judge to disqualify himself when "his impartiality might reasonably be questioned." Thus, under § 455(a) an actual demonstrated

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[24] *Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d 98, 100 (5th Cir.1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976) (quoting *United States v. Thompson*, 483 F.2d 527, 528 (3d Cir.1973)).

[25] *See Selfridge v. Gynecol, Inc.*, 564 F.Supp. 57, 58(D.Mass.1983) (quoting 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3551, at 374 (1975)); Hjelmfelt, *supra*, note 22, at 256.

[26] *See Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d at 103; *United States v. Jaramillo*, 745 F.2d 1245, 1249 (9th Cir.1984), *cert. denied*, 471 U.S. 1066, 105 S.Ct. 2142, 85 L.Ed.2d 499 (1985); *Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir.1979).

[27] *Davis v. Board of School Comm'rs*, 517 F.2d at 1051.

[28] *Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d at 103; H.R.Rep. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S.Code Cong. & Admin.News 6351, 6355.

prejudice need not exist in order for a judge to recuse himself: "disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."[29] Congress expressly intended the amended § 455 to promote public confidence in the impartiality of the courts by eliminating even the appearance of impropriety.[30] Although the courts retained the requirement that the alleged bias or prejudice "stem from an extrajudicial source" and now permitted the factual accuracy of affidavits submitted under § 455 to be scrutinized,[31] the general effect of this statute was to liberalize greatly the scope of disqualification in the federal courts.

The amended § 455 also established a number of bright line rules for disqualification. Mandatory disqualification is provided for in certain situations where the potential for conflicts of interest are readily apparent. For example, under subsection (b), a judge must disqualify himself when he has a financial interest or when a member of his family "within the third degree of relationship" is a party or lawyer in the case. The statute also states that the parties

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[29] *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

[30] See H.R.Rep. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S.Code Cong. & Admin. News at 6355 (amendment to § 455 "is designed to promote public confidence in the impartiality of the judicial process").

[31] *See, e.g., Hamm v. Members of Bd. of Regents of Florida*, 708 F.2d 647, 651 (11th Cir.1983); *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1019 n. 6, 1020 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982); *In re International Business Machines Corp.*, 618 F.2d 923, 927-29 (2d Cir.1980); *see also* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 3542 &3550.

cannot waive the *per se* rules of disqualification set out in § 455(b).[32]

3. Discussion

Defendants assert a number of grounds for the disqualification of Judge Clemon. Defendants first allege in their affidavits that Judge Clemon has two minor children and thus is disqualified because these children are members of the plaintiff class. Judge Clemon proudly admits to having two children who were ages 9 and 16 at the time of appellants' motions. The class certified by the trial judge includes all children "who are eligible to attend or who will become eligible to attend the public institutions of higher education in the Montgomery, Alabama, area." Consequently, Judge Clemon's children are technically members of this class and possess an interest in the outcome of this litigation. Section 455 provides for disqualification where the judge knows that a "minor child residing in his household, has a financial interest . . . or any other interest that could be substantially affected by the outcome of the proceeding"[33] or if "[h]e or his spouse, or a person within the third degree of relationship . . . is a party to the proceeding."[34] Defendants argue that the trial judge should be disqualified under the terms of this provision.

We conclude that the interests of Judge Clemon's children are not "substantial" enough to merit disqualification. Any beneficial effects of this suit upon these children were remote, contingent and speculative. There is no evidence that Judge Clemon's children have any desire or inclination to attend a Montgomery area institution. Any potential interest, moreover, is shared by all young black Alabamians. "[A]n interest which a judge has in common with

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[32] 28 U.S.C. § 455(e). This subsection does provide for waiver of claims raised under § 455(a) after full disclosure by the trial judge.

[33] 28 U.S.C. § 455(b)(4).

[34] 28 U.S.C. § 455(b)(5).

many others in a public matter is not sufficient to disqualify him."[35] In similar circumstances where federal judges have possessed speculative interests as members of large groups, the federal courts have held these interests to be too attenuated to warrant disqualification. The courts also have concluded that no personal bias or reasonable doubt about the judge's impartiality exists in these circumstances.[36] Most significant for our decision here is the Fifth Circuit's *In re City of Houston.*[37] In that case the Fifth Circuit addressed a challenge to a black judge in a voting rights action in which the judge was a class member. The court denied the motion to disqualify, ruling that the posture of the trial judge—possessing an attenuated non-pecuniary interest no different from that of the general voting public in Houston—was not what Congress intended to proscribe in drafting §§ 144 and 455. We reach the same conclusion here.

To disqualify Judge Clemon on the basis of his children's membership in the plaintiff class also would come dangerously close to holding that minority judges must disqualify themselves from all major civil rights actions. As the *In re Houston* court noted:

> Many civil rights suits are brought in the form of class actions. Considering the broad declaratory and injunctive relief that federal courts are called upon to

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[35] *In re City of Houston*, 745 F.2d 925, 929-30 (5th Cir.1984) (quoting 48A C.J.S. Judges § 123 (1981)).

[36] *In Christiansen v. National Savings and Trust Co.*, 683 F.2d 520, 525-26 (D.C.Cir.1982), for example, the class was defined as "all federal employees who were Blue Cross and Blue Shield subscribers." There, the court held that the "interest of subscribing judges is too contingent and remote." *Id.* at 526. Trial judges also have been permitted to preside over massive antitrust suits against utility companies with whom they are customers. *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d794 (10th Cir.1980); *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir.1976).

[37] 745 F.2d 925 (5th Cir.1984).

> dispense, it is hard to imagine a case in which a minority judge would not have a family member within the class. . . .[38]

To disqualify minority judges from major civil rights litigation solely because of their minority status is intolerable. This court cannot and will not countenance such a result. The recusal statutes do not contemplate such a double standard for minority judges. The fact that an individual belongs to a minority does not render one biased or prejudiced, or raise doubts about one's impartiality: "that one is black does not mean, *ipso facto*, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant."[39] Defendants' argument cuts too broadly since every Alabama judge with children, whether members of the class or not, has an interest in the future of the state university system.[40] As Judge Higginbotham eloquently wrote:

> It would be a tragic day for the nation and the judiciary if a myopic vision of the judge's role should prevail, a vision that required judges to refrain from participating in their churches, in their non-political community affairs, in their universities. So long as Jewish judges preside over matters where Jewish and

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[38] *Id.* at 930. It also is interesting to note that the class in the instant case includes "Black citizens who were, are or will become eligible to be employed by the public institutions of higher education in the Montgomery, Alabama, area." Judge Clemon therefore is arguably a member of the class and disqualified under appellants' theory, since he could become a professor or employee at one of these institutions.

[39] *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 388 F.Supp. 155, 163 (E.D.Pa.1974).

[40] *See In re City of Houston*, 745 F.2d 925 (5th Cir.1984) (interests of all voters in Houston implicated in voting rights suit); *cf. Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d 98, 103 (5th Cir.1975) (en banc) (all judges in the circuit were members of segregated bar associations at one time), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).

> Gentile litigants disagree; so long as Protestant judges preside over matters were Protestant and Catholic litigants disagree; so long as white judges preside over matters where white and black litigants disagree, I will preside over matters where black and white litigants disagree.[41]

Nor can we countenance defendants' claim that Judge Clemon is prejudiced and no longer impartial by virtue of his background as a civil rights lawyer. Appellants point to Judge Clemon's representation of black plaintiffs in race discrimination actions prior to joining the bench as evidence of personal bias in this action. It is well settled that "the facts pleaded . . . will not suffice to show the personal bias required by the statute if they go to the background and associations of the judge rather than to his appraisal of a party personally."[42] All judges come to the bench with a background of experiences, associations, and viewpoints. As Justice Rehnquist commented, proof that a judge's mind was a complete tabula rasa would be evidence of lack of qualification, not lack of bias.[43] A judge is not required to recuse himself merely because he holds and has expressed certain views on a general subject.[44] We conclude that

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[41] *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 388 F.Supp at 181. *See also In re City of Houston*, 745 F.2d 925 (5th Cir.1984); *Paschall v. Mayone*, 454 F.Supp. 1289 (S.D.N.Y.1978); *Blank v. Suilivan & Cromwell*, 418 F.Supp 1 (S.D N.Y.1975).

[42] *Paschall v. Mayone*, 454 F.Supp. 1289 (S.D.N.Y.1978) (quoting *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 388 F.Supp. at 159); accord *Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d at 101; *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir.1984), *cert. denied*, 469 U.S. 1191, 105 S.Ct. 964, 83 L.Ed.2d 969 (1985); *Parker Precision Products Co. v. Metropolitan Life Ins. Co.*, 407 F.2d 1070, 1077-78 (3d Cir.1969).

[43] *Laird v. Tatum*, 409 U.S. 824, 835, 93 S.Ct. 7, 14, 34 L.Ed.2d 50 (1972) (Rehnquist, J., mem.).

[44] For example, Justice Rehnquist sat in *Laird v. Tatum* which he had previously discussed while testifying before Congress; Justice

Judge Clemon's background representing plaintiffs in civil rights actions does not warrant disqualification.[45]

Similarly, the views expressed by Judge Clemon as a political figure and member of the Alabama State Senate do not mandate disqualification.[46] As judges on this court

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Frankfurter sat in labor cases despite having written extensively in the field before going to the Supreme Court; Chief Justice Hughes sat in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), despite having written a book addressing the issue raised in the case. See *Laird v. Tatum*, 409 U.S. at 831-833, 93 S.Ct. at 11-12. It should be noted, however, that a stronger "duty to sit" may exist for Supreme Court Justices due to the potential for deadlock in the nation's highest court.

[45] *See, e.g., Laird v. Tatum*, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972); *Rosquist v. Soo Line Railroad*, 692 F.2d 1107, 1112 (7th Cir.1982); *Barry v. United States*, 528 F.2d 1094 (7th Cir.), *cert. denied*, 429 U.S. 826, 97 S.Ct. 81, 50 L.Ed.2d 88 (1976); *Association of Nat'l Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1171 n. 51 (D.C. Cir.1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980); *Idaho v. Freeman*, 507 F.Supp. 706, 728 (D.Idaho 1981); *Paschall v. Mayone*, 454 F.Supp. 1289, 1301 (S.D.N.Y.1978); *Blank v. Sullivan & Cromwell*, 418 F.Supp. 1, 4-5 (S.D.N.Y.1975); *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 388 F.Supp. 155 (E.D.Pa.1974).

[46] Appellants' affidavits also assert that Judge Clemon had a personal and political relationship with former Senator Donald Stewart, then counsel of record for defendant Alabama A & M. Appellants argue that this relationship raised questions about Judge Clemon's impartiality. 28 U.S.C. § 455(a). The record shows, however, that Stewart ended his representation of A & M several months before trial. The evidence also fails to demonstrate the kind of close personal ties that would affect the trial judge's judgment. *See Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671 (1st Cir.1984) (judge's relationship with Senator who was responsible for his appointment did not necessitate disqualification in case involving Senator's former law firm and Senator's cousin), *cert. denied*, 469 U.S. 1191, 105 S.Ct. 964, 83 L.Ed.2d 969 (1985); *Warner v. Global Natural Resources*, 545 F.Supp. 1298 (S.D.Ohio 1982) (judge not disqualified where plaintiff was an acquaintance who had supported his nomination to federal bench). See also *Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d at 102; *In re Beard*, 811 F.2d 818, 828 (4th Cir.1987); *Firnhaber v. Sensenbrenner*, 385 F.Supp. 406, 411-12 (E.D.Wis.1974); *cf. United States*

have recognized, "[i]t appears to be an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs."[47] Since the funding and control of public institutions in the instant case are important issues in the Alabama political arena, it is not surprising that Judge Clemon took public positions concerning these institutions prior to becoming a judge. The fact that prior to joining the bench a judge has stated strong beliefs does not indicate that he has prejudged the legal question before him. As noted above, judges have frequently heard cases concerning subjects about which they have previously expressed some views.[48]

Judge Clemon's involvement in the issues before this court went beyond the mere making of public statements, however. During his tenure in the state legislature, the trial judge actively participated in the very events and shaped the very facts that are at issue in this suit.[49] As

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v. Murphy, 768 F.2d 1518, 1537-38 (7th Cir.1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986).

[47] *Curry v. Baker.*, No. 86-7639 (11th Cir. September 24, 1986) (Vance, J., mem.). *See also Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir.1984) ("It is common knowledge, or at least public knowledge, that the first step to the federal bench for most judges is either a history of active partisan politics or strong political connections. . . ."), *cert. denied*, 469 U.S. 1191, 105 S.Ct. 964, 83 L.Ed.2d 969 (1985).

[48] *See supra* notes 43-45 and accompanying text.

[49] Appellees argue that this court must not consider Judge Clemon's activities as a state Senator since these facts were not presented to Judge Dyer. The question of whether considerations of timeliness apply under § 455 is a difficult one. Despite the Justice Department's recommendation, *see* H.R.Rep No. 1453, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S.Code Cong. & Admin.News at 6358, Congress did not incorporate a time limitation into the amended statute, and courts have differed as to whether the timeliness requirement of the prior § 455 survived. *Compare, e.g., In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir.1980) *with SCA Services, Inc. v. Morgan*, 557

chairman of the Senate Rules Committee, Judge Clemon played a critical role in the confirmation of those individuals nominated for positions on the board of trustees of the defendant institutions. Judge Clemon shaped the composition of these governing boards by acting along with other members of his committee to prevent nominations from reaching the Senate floor. For example, press accounts indicate that Judge Clemon was instrumental in preventing the confirmation of Thomas Radney to the Board of Trustees of ASU and that Judge Clemon opposed the nomination on the explicit grounds that Radney's confirmation would have created a white majority on the ASU

F.2d 110 (7th Cir.1977). In *United States v. Slay*, 714 F.2d 1093 (11th Cir.1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct.729, 79 L.Ed.2d 189 (1984), this court applied a timeliness requirement to the disqualification claim brought under § 455(a), but not to a claim brought under § 455(b)(1). *See also* Note, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U.Chi.L.Rev. 236, 265 (1978). Even if the principle of timeliness has some application to motions brought under § 455(b), it would be inappropriate to apply this principle under the circumstances of this case. Those courts that have adopted a timeliness requirement have done so "to prevent litigants from abusing motions to disqualify as dilatory tactics or as a means to 'sample the temper of the court' before deciding whether to raise an issue of disqualification." *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 503 F.Supp. 368, 381 (N.D.Ohio 1980) (quoting *United States v. Conforte*, 457 F.Supp. 641, 654 n. 7 (D.Nev.1978), aff'd, 624 F.2d 869 (9th Cir.) *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980)); *see also Delesdernier v. Porterie*, 666 F.2d 116, 122 n. 4 (5th Cir.), *cert. denied*, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed.2d 81 (1982). Appellants here were not acting to delay or to speculate on a favorable substantive judgment in the interim. Motions to disqualify Judge Clemon were filed at the earliest stages of the litigation and aggressively prosecuted throughout. Appellants did not discover relevant information about Judge Clemon's activities as a state legislator until late in the litigation, and raised this ground for disqualification at the first available moment. *See Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F.Supp. 84, 89-90 (S.D.Ala.1980); *Delesdernier v. Porterie*, 666 F.2d at 122 n. 4; *Cleveland Elec. Co.*, 503 F.Supp. at 381. Given the critical importance of the appearance of impartiality guaranteed by § 455, we refuse to adopt the cramped interpretation of this statute asserted by appellees here.

board. Regardless of whether the specific allegation concerning the Radney nomination is true, it is clear that Judge Clemon's activities in the Senate were relevant to and plainly affected the ultimate outcome of the nomination and confirmation process for the board of trustees of the defendant institutions. Yet Judge Clemon explicitly found at trial that the composition of defendants' governing boards was a relevant and important factor in his finding of liability. In determining whether the dual system had been disestablished, "considerations of the racial identifiability of the . . . governing boards are probative." His opinion examines in detail the racial composition of the board of trustees for each institution of public higher educaton in Alabama. In his examination of the composition of these governing boards, Judge Clemon was in part examining his own handiwork.

While in the statehouse, Judge Clemon also helped spearhead a bill to appropriate $10,000,000 to Alabama A & M. Judge Clemon cosponsored this bill which was intended to provide capital funds to improve A & M's physical plant. The stated premise of this bill was that the facilities of A & M were inferior to those of the historically white universities. Despite then Senator Clemon's best efforts to gain passage of this bill aiding A & M physical plant, the bill failed in the legislature. At trial, A & M cited the defeat of this bill as evidence of racial animus. Thus Judge Clemon was again forced to make factual findings about events in which he was an active participant. At trial, he found the "extent of renovations over the last 30 years at A & M to be wanting." Judge Clemon also detailed the poor physical conditions at A & M and found the "Alabama's choice of resource allocation for facilities for the period 1965 to 1983 significantly impaired the ability of Alabama State and A & M to attract white students." Regardless of the accuracy of these findings, Judge Clemon was making factual determinations about bills and legislative fights in which he played an active part.

The trial judge's activities as a private lawyer also involved him in the disputed evidentiary facts of this case. Judge Clemon served as an attorney of record for individual plaintiffs in the school desegregation case of Lee v. Macon County Board of Education.[50] Filed in 1970, *Lee v. Macon* included claims under title VI of the Civil Rights Act against many of the same institutions of higher learning as appear here. These claims took place during periods of time which are relevant to the present case under the "vestiges" theory utilized by plaintiffs. In denying the recusal motion, Judge Clemon stated that he took no part in the portion of *Lee v. Macon* involving institutions of higher education. He noted that the caption of *Lee v. Macon* was used in many smaller actions that grew out of the original suit. According to Judge Clemon, his involvement was restricted to the representation of black high school principals in a race discrimination suit. Even this limited involvement in *Lee v. Macon*, however, left Judge Clemon with knowledge of facts that were in dispute in the instant case. The State's treatment of black high school principals during the period the trial judge represented their cause became a factual issue at trial. Plaintiff presented testimony about the long, continuous history of racially discriminatory employment practices suffered by black high school principals in Alabama. A study also was offered "for the purpose of demonstrating that there was, during the period covered [1966-1970], a decrease, substantial decrease in the number of percentage in black educators in Alabama in general and black principals in particular." Over defendants' objection, the trial judge accepted in evidence the testimony and exhibits about the status of Alabama's black high school principals. Judge Clemon admitted this evidence as relevant to prove "that as a vestige of the prior de jure system, the state enforced and pursued racially discriminatory employment practices

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[50] 317 F.Supp. 103 (M.D.Ala.1970), *aff'd in part, modified in part*, 453 F.2d 524 (5th Cir.1971).

during the period covered by the study." On this issue—whether black high school principals suffered racial discrimination—Judge Clemon was once again faced with evaluating evidence of which he had special extrajudicial knowledge.

> The language of § 455(b) is unequivocal: [A judge] shall also disqualify himself in the following circumstances:
>
> > (1) Where he has . . . *personal knowledge of disputed evidentiary facts* concerning the proceeding.[51]

The Reporter's Notes to the Code of Judicial Conduct are equally clear: "The Committee also concluded that a judge cannot be, or cannot appear to be, impartial if he has personal knowledge of evidentiary facts that are in dispute."[52] Judge Clemon's disqualification is thus mandated because of his involvement in the disputed factual issues surrounding the composition of defendants' governing boards, the legislative efforts to improve A & M's physical plant, and the State's treatment of black high school principals. Such personal knowledge vitiates the carefully constructed rules of procedure and evidence that ensure deliberate, unbiased fact finding. Litigants also are entitled to have their case decided by a judge who can approach the facts in a detached, objective fashion. Judge Clemon's partisan efforts in these disputes raise legitimate questions about his impartiality in deciding these factual matters. To permit Judge Clemon to decide a case in which he had extrajudicial, personal knowledge of disputed facts would

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[51] 28 U.S.C. § 455(b) (emphasis added).

[52] Thode, Reporter's Notes to Code of Judicial Conduct, 62 (1973). Section 455(b)(1) was taken from a comparable provision of the Code of Judicial Conduct.

be contrary to the express language and underlying spirit of the statute, as well as the case law.[53]

This court is not impervious to the burden that disqualification at this juncture places on the court system, the litigants, and the people of Alabama. We recognize that new proceedings before a new judge will exact a not inconsiderable cost in time, energy, and legal fees.[54] The intensity and complexity of this litigation, however, is a measure of its significance. We consider the future of higher education in Alabama too important to be decided under a cloud. In a decision such as this one, a decision which will affect millions of Alabamians, public confidence in the judicial system demands a judge free from personal knowledge or biases about the issues before the court. For

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[53] Courts have found recusal mandated in cases in which the judge's personal knowledge was considerably less extensive and relevant. In one particularly striking example, a judge recused himself on the basis of his activities as a state legislator forty years earlier even though he confessed that he had absolutely no recall of what actions, if any, he took. *Limeco, Inc. v. Division of Lime*, 571 F.Supp. 710 (N.D.Miss.1983). *See also United States v. Yagid*, 528 F.2d 962, 965 (2d Cir.1976); *W. Clay Jackson Enter., Inc. v. Greyhound Leasing & Fin. Corp.*, 467 F.Supp. 801 (D.P.R.1979). *See generally Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir.1980.).

Appellees' reliance on Justice Rehniquist memorandum opinion in *Laird v.Tatum*, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972), and the cases cited therein, is inapposite. Justice Rehnquist took pains to refute the allegation that he had any personal knowledge of the case. *Id.* at 827-28, 93 S.Ct. at 10. Although Justice Rehnquist and the other judges discussed in his memorandum had strong views, they did not have special knowledge of any disputed facts. It also is noteworthy that Laird and the cases Rehnquist discusses were decided prior to the abolition of the 'duty to sit' doctrine. *Id.* at 837, 93 S.Ct. at 14.

[54] The trial in *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980), lasted thirty-three days and "spawned" a record of twenty-five volumes. Nevertheless, this circuit ruled that the trial judge should have disqualified himself and remanded for a new trial.

this reason, we disqualify Judge Clemon and remand for a new trial.[55]

C. Title VI Claims

The complaint of the United States asserts that this action was brought pursuant to the fourteenth amendment of the United States Constitution and title VI of the Civil Rights Act of 1964. Defendants challenge the authority of the United States to bring this suit under these provisions. Specifically, defendants argue that the Attorney General lacks the statutory authority necessary to establish standing in an action under the fourteenth amendment. Defendants also argue that the government failed to comply with the program specificity requirement of title VI when it treated the various institutions of public higher education in Alabama as part of a single system. In its brief and oral argument before this court, the United States conceded that the Attorney General lacked the authority to proceed under the fourteenth amendment.[56] Thus the issue before this court is whether the broad systemic

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[55] In remanding for a new trial, we express no opinion as to Judge Clemon's handling of the lawsuit. As the Fifth Circuit noted:

> [I]t makes no difference how much practical effect [the trial judge's recusal] would have had on the outcome of the litigation. The purpose ofthe disqualification statute is to avoid even the appearance of impropriety; the appearance of impropriety is not lessened by the fact that the litigation would have come out the same anyway. *Cf.* Wright & Miller, *supra*, § 3553 ("[t]here should be no room in [the recusal] context for the concept of harmless error to apply, nor for arguments to be made that in fact the judge acted in an impartial manner").

Health Serv. Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir.1986), *cert. granted*, ___ U.S. ___, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987).

[56] A number of courts have rejected an expansive view of the Attorney General's fourteenth amendment standing. *See, e.g., United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir.1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir.1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir.1977).

approach adopted by the United States is permissible under title VI of the Civil Rights Act of 1964.

Title VI is spending power legislation. It rests on the principle that "taxpayers' money, which is collected without discrimination, shall be spent without discrimination."[57] Title VI is a typical "contractual" spending power provision, "extending an option" to potential recipients to accept or reject federal monies depending on whether they are willing to end discrimination.[58] The precise language of title VI states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[59]

The complaint of the United States does not specify which programs and activities within the defendant institutions receive federal funds or how these particular programs and activities are discriminatory. The government simply asserts that defendant institutions receive some federal assistance and that the entirety of public higher education in Alabama is permeated with discrimination.[60] The United States argues that, taken together, the ten public colleges and universities along with the various state

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[57] 110 Cong. Rec. 7064 (1964) (statement of Sen. Ribicoff). See also *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 599, 103 S.Ct. 3221, 3231, 77 L.Ed.2d 866 (1983). *Cf.* Note, *Grove City College v. Bell and Program-Specificity: Narrowing the Scope of Federal Civil Rights Statutes*, 34 Cath.U.L.Rev. 1087, 1090 n. 7 (1985).

[58] *Guardians Ass'n*, 463 U.S. at 599, 103 S.Ct. at 3231; *United States Dept. of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 106 S.Ct. 2705, 2711, 91 L.Ed.2d 494 (1986).

[59] 42 U.S.C. § 2000d (emphasis added).

[60] The government's statement in the pretrial order is that "defendants are recipients of substantial amounts of federal financial assistance."

boards, commissions and officials named in the suit constitute a "program or activity receiving federal assistance." The government acknowledged at oral argument that it could cite no case law in support of its contention that independent public institutions could be merged into a single system for the purposes of title VI. According to the government, this case represented the first time that its systemic approach had reached adjudication. The United States argued that this new theory was demanded by the facts of this case—only by including often blameless individual institutions and actors can the State's violation be described and corrected.[61]

It appears to this court that the United States overstates the novelty of its attempt to satisfy title VI's requirement by defining the program as the collective "system" comprised of the various public colleges and universities, committees and officials. Rather, on closer examination, the government's argument can be seen as merely another variant on the broad "associative" theories that have been soundly repudiated by the Supreme Court and lower courts.

The United States Supreme Court decision in *Grove City College v. Bell*[62] serves as the leading case on the program-

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[61] The United States opines:

> The University of Alabama protests that there has never been a way it could bring itself into compliance with Title VI under the government's (and apparently, the court's) theory of liability. This assumes that each ofthe traditionally white schools has actually been found liable under Title VI. Our principal contention . . . has been that the State has caused a systemic violation. It has done so, at least in part, by favoring the traditionally white schools with money and programs. The schools are necessary parties because there is no way to describe the violation without implicating them, and no way to correct it that will fail to affect them.

Brief of United States, p. 68 n. 37 (citations omitted).

[62] 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). This court

specific nature of title VI. The students at Grove City College received monies from federally funded student assistance programs. Based on the federal funding of Grove City students, the Department of Education claimed that the entire college must comply with title IX. Interpreting language identical to and directly modeled after that found in title VI,[63] the Supreme Court took a different tack. The Court agreed with the government that Grove City College could be considered to be "receiving Federal financial assistance" even though the funds were received by the students. The Supreme Court ruled, however, that Grove City's use of these funds did not trigger institution-wide coverage of the federal regulations. Only the specific program within the college receiving the federal assistance could be subjected to the statute. The Court rejected justifications for a broader reading of the "program or activity" requirement:

> [T]he Court of Appeals' assumption that Title IX applies to programs receiving a larger share of a school's own limited resources as a result of federal assistance earmarked for use elsewhere within the institution is inconsistent with the program-specific nature of the statute. Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to deter-

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is aware that the United States did not have guidance from Grove City when it filed its complaint in 1983.

[63] Title IX of the Education Amendments of 1972 and section 504 of the Rehabilitation Act of 1973 were modeled after title VI and contain identical language. The Supreme Court has assumed the meaning of this program-specific language to be the same for all three statutes. *See, e.g., School Board v. Arline,* ___ *U.S.* ___, *107 S.Ct. 1123, 1126 & n. 2, 94 L.Ed.2d 307 (1987); United States Dept. of Transp. v. Paralyzed Veterans,* 106 S.Ct. at 2708 & n. 4, 2714; *Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, 636, 104 S.Ct. 1248, 1255, 79 L.Ed.2d 568 (1984); *North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 102 S.Ct. 1912, 1926, 72 L.Ed.2d 299 (1982); *see also Brown v. Sibley,* 650 F.2d 760, 767-68 (5th Cir. Unit A 1981).

> mine which programs or activities derive such indirect benefits. Under the Court of Appeals' theory, an entire school would be subject to Title IX merely because one of its students received a small BEOG [Basic Educational Opportunity Grant] or because one of its departments received an earmarked federal grant. This result cannot be squared with Congress' intent.[64]

Accordingly, the Supreme Court held that the only part of the college subject to the federal regulations was the college's own financial aid program.

Two terms later, the Supreme Court returned to the issue of what constituted a "program or activity receiving Federal financial assistance." In *United States Department of Transportation v. Paralyzed Veterans,*[65] the Supreme Court reaffirmed its intention to enforce strictly the program-specific nature of this language. Utilizing arguments that bear more than a passing resemblance to those of the government here, the Department of Transportation attempted to fuse airports and airlines into a single program or activity for the purposes of the statute.[66] The Supreme Court rejected the government's efforts to expand the regulations' coverage to broad concepts such as the "commercial aviation system" or the "interstate highway system." Given the United States' efforts to characterize "Alabama's public higher education system" as the relevant "program or activity," the reasoning of the *Paralyzed Veterans* Court is telling:

> The Court of Appeals found that airports and airlines are "inextricably intertwined" and that the "in-

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[64] 465 U.S. at 572-73; 104 S.Ct. at 1221.

[65] 477 U.S. 597, 106 S.Ct. 2705, 91 L.Ed.2d 494 (1986).

[66] The airlines were private corporations who received no federal funding. To bring the airlines under the sway of § 504, the Department of Transportation attempted to combine them with airports, since airports receive substantial federal aid.

dissoluble nexus between them is the provision of commercial air transportation." For these reasons, the Court of Appeals concluded that commercial airlines are part of a federally assisted program of "commercial air transportation" because they make use of airports that accept federal funds, and because airports are "indispensable" to air travel.

* * *

The Court of Appeals' reliance on *Grove City* in support of its definition of the relevant program or activity is misplaced. In Grove City, despite the arguably "indissoluble nexus" among the various departments of a small college, we concluded that only the financial aid program could be subjected to Title IX. In any analogy between *Grove City* and this case, airport operators would be placed in the position of the College. It is readily apparent that our conclusion in *Grove City* that only a portion of the College was covered by Title IX cannot support the conclusion that commercial air transportation—a concept much larger than the airports—is the program or activity covered by § 504. The Court of Appeals' attempt to fuse airports and airlines into a single program or activity is unavailing. *It is by reference to the grant statute, and not to hypothetical collective concepts like commercial aviation or interstate highway transportation, that the relevant program or activity is determined.*[67]

While the Supreme Court did not address the program-specific nature of these spending power statutes until these relatively recent decisions, this circuit has strictly enforced the "program or activity" requirement of title VI since its 1969 decision in *Board of Public Instruction v. Finch.*[68] *Finch* effectively disposes of the government's arguments

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[67] 106 S.Ct. at 2713-14 (citations omitted) (emphasis added).

[68] 414 F.2d 1068 (5th Cir.1969).

here. In Finch, the Department of Health, Education and Welfare found the Taylor County School Board guilty of "seeking to perpetuate the dual school system through its construction program."[69] HEW's hearing examiner and Reviewing Authority found vestiges of discrimination and entered an order to terminate "any classes of Federal financial assistance" to the Taylor County School District "arising under any Act of Congress" administered by HEW, the National Science Foundation and the Department of the Interior.[70] Neither the hearing examiner or Reviewing Authority made any finding as to the individual grants awarded the Taylor County School system or the particular programs receiving federal money. The School Board went to court to stop the cut-off of funds and argued that HEW had failed to meet the "programatic specificity" requirement of title VI. The Department responded by contending that "the term program in the statute does not refer to individual grant statutes, but to general categories such as . . . school programs."[71]

Our predecessor court sided with the Taylor County School Board. In a ruling later cited with approval by the Supreme Court,[72] Finch held that HEW's attempt to characterize the entire school system as the relevant "program" was contrary to the legislative history of title VI. A review of the congressional debate showed that the leg-

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[69] *Id.* at 1071.

[70] *Id.*

[71] *Id.* at 1076.

[72] In *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), the Supreme Court cited *Finch* with approval for the proposition that "language in §§ 601 and 602 of Title VI, virtually identical to that in §§ 901 and 902 and on which Title IX was modeled, has been interpreted as being program specific." *Id.* at 538, 102 S.Ct. at 1926. See also Flaccus, *Discrimination Legislation for the Handicapped: Much Ferment and the Erosion of Coverage*, 55 U.Cin.L.Rev. 81, 102-03 (1986).

islators expected the statute to be applied to narrowly focused grants, referring by name to programs such as the school lunch program, the agriculture extension program for home economics teachers, aid for vocational agriculture teaching, and aid to impacted school districts. The Finch court concluded that Congress intended title VI to apply "to particular grant statutes . . ., not to a collective concept known as a school program or a road program."[73] The court vacated the HEW order and remanded the case back to the agency for specific findings of fact as to which particular programs within the school district received federal monies and how each of these particular programs was being administered in a discriminatory manner or was being "so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory."[74]

Countless other courts in this and other circuits have reached the same result and have refused to permit plaintiffs to use broad concepts such as "the University of Alabama system" to circumvent the program specificity requirement of title VI.[75] This focus on the particular pro-

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[73] 414 F.2d at 1077 (emphasis in original). *See also* Note, *The Program-Specific Reach of Title IX*, 83 Colum.L.Rev. 1210, 1228-32 (1983).

[74] 414 F.2d at 1079.

[75] *See, e.g., Brown v. Sibley*, 650 F.2d 760, 769-70 (5th Cir. Unit A 1981) (federal funding of organization's counseling service and warehouse construction did not subject broom production shop to § 504); *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202 (9th Cir.1984) (federal funding of airline's small community service did not subject carrier to § 504 of Rehabilitation Act), *cert. dismissed*, 471 U.S. 1062, 105 S.Ct. 2129, 85 L.Ed.2d 493 (1985); *Foss v. City of Chicago*, 640 F.Supp. 1088 (N.D.Ill.1986) (federal funding of Chicago Fire Department's first aid training for residents, emergency preparedness and disaster services and advanced education program did not trigger application of § 504 to entire department), *aff'd*, 817 F.2d 34 (7th Cir.1987); *Chaplin v. Consolidated Edison Co.*, 628 F.Supp. 143 (S.D.N.Y.1986) (federal funding of company's special trainee employees subjects only Specialized

gram receiving the federal funds has been especially strong in the higher education context. Courts have consistently held that federal aid to one area of a college or university, such as grants for academic research or new facilities or student work study, will not subject other areas of the institution to federal regulation.[76] The lack of precedential support for the government's systemic approach is not a product of the theory's innovativeness; it simply reflects the fact that this theory has been uniformly rejected by the federal courts.[77]

Training Department to § 504, not entire company); *Bachman v. American Soc'y of Clinical Pathologists*, 577 F.Supp. 1257 (D.N.J.1983) (federal funding of organization's alcohol abuse activities does not subject organization's certification activities to federal regulation under § 504).

[76] *See, e.g., Doyle v. University of Alabama in Birmingham*, 680 F.2d 1323 (11th Cir.1982) (federal funding of some university programs does not subject program employing plaintiff to § 504 of Rehabilitation Act); *Bennett v. West Texas State University*, 799 F.2d 155 (5th Cir.1986) (federal funding of student service fees, work study program and federal building subsidies does not subject college's athletic program to title IX); *O'Connor v. Peru State College*, 781 F.2d 632 (8th Cir.1986) (federal funding of college's academic research and instruction did not subject college's athletic program to title IX); *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir.1981) (federal funding of work study program did not subject the entire law school to title IX), *cert. denied*, 456 U.S. 928, 102 S.Ct. 1976, 72 L.Ed.2d 444 (1982); *Mabry v. State Bd. for Community Colleges*, 597 F.Supp. 1235 (D.Col.1984) (federal funding of various college activities did not subject programs taught by plaintiff to title IX where none of these programs benefited from federal aid), *aff'd on other grounds*, 813 F.2d 311 (10th Cir.1987).

[77] Appellees attempt to distinguish the line of cases rejecting a systemic approach by arguing that these cases dealt with the termination of funds. Our review of title VI's legislative history reveals no intention to apply different standards to suits to achieve compliance and those to terminate funds. Nor can we perceive any reason why the program specificity requirement of title VI should be different for compliance actions and termination actions. Both types of cases are brought pursuant to title VI, and the same program specific language should apply regardless of the remedy sought.

Title VI mandates a more rigorous analysis of the federal assistance received by defendants than was undertaken below. Under the United States' theory of the case, it was sufficient that some defendants received some federal assistance. The United States presented no evidence, and the trial court made no findings, detailing which programs and activities within these defendant institutions received federal funding. Because of this failure to identify the particular federally assisted programs being affected, the United States could not show how the actions of defendants rendered these programs discriminatory. Such detailed showings are necessary to satisfy the program specificity requirement of title VI. We thus hold that the action of the United States cannot stand as presently constituted, and its complaint and proof must be redrawn to make the requisite showings of which particular programs or activities received federal funding and how these programs were discriminatory.

The program specificity requirement is not some pointless technical exercise. Even if the United States were ultimately able to sue many of the same defendants raising the same basic claims of discrimination,[78] a focus on how each program is discriminatory will go far to clarify this complex and often times confusing litigation. The program specificity requirement also serves to protect innocent beneficiaries of programs *not* tainted by discriminatory practices. As this court noted in *Finch*,

> If the funds provided by the grant are administered in a discriminatory manner, or if they support a pro-

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[78] For example, if the United States can show that a defendant institution received non-earmarked general revenue grants, the relevant "program" may include all activities receiving funds out of that general account. See *Arline v. School Bd.*, 772 F.2d 759, 763 (11th Cir.1985), *aff'd*, ___ U.S. ___, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987); Note, *The Program-Specific Reach of Title IX*, 83 Colum.L.Rev. 1210, 1237-40 (1983).

gram which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a "political entity or part thereof"), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own "day in court."[79]

D. Equal Protection Claim

The Knight intervenors also assert a claim under title VI. Since the Knight intervenors adopted the same systemic approach as the United States, their title VI claim falls to the analysis set out above. In addition, however, the Knight intervenors in their complaint allege that their rights under the equal protection clause of the fourteenth amendment to the United States Constitution have been violated by defendants and that they therefore seek relief under 42 U.S.C. § 1983. The Knight intervenors are plainly entitled to bring a § 1983 action charging that they suffered discrimination in violation of the equal protection clause due to unequal and segregative public higher edu-

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[79] 414 F.2d at 1078.

cation in the Montgomery area.[80] Defendants' objections to the Knight intervenors' standing are frivolous. Contrary to defendants' contentions, the Knight intervenors are not asserting the institutional rights of ASU. The Knight intervenors are asserting their own rights as individuals who suffered racial discrimination by virtue of attending or working at an unequal, segregative institution of public higher education. The Knight intervenors are the proper party to bring this claim.[81]

IV. CONCLUSION

That all may drink with confidence from their waters, the rivers of justice must not only be clean and pure, they must appear so to all reasonable men and women. Under the particular facts before us, the prior activities of the district judge cloud the court's impartiality and diminish its moral force. Accordingly, we REVERSE the judgment of the District Court and REMAND to the Chief Judge of the Northern District of Alabama with instructions (1) that the complaint of the United States be dismissed without prejudice, (2) that the title VI claim of the Knight intervenors be dismissed without prejudice, and (3) that the remaining claims be assigned to himself or another judge for a new trial or other proceedings[82] not inconsistent with this opinion.

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[80] *See United States v. Alabama*, 791 F.2d 1450 (11th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987).

[81] This court, of course, expresses no opinion as to the correctness of the class certification, the res judicata effect of *Alabama State Teachers Ass'n v. Alabama Pub. School and College Auth.*, 289 F.Supp. 784 (M.D.Ala.1968), *aff'd per curaim*, 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969), or other rulings concerning the Knight intervenors' claim. We simply hold that the Knight intervenors have standing to bring this action.

[82] In the event that no amended title VI claim withstands defendants' motion to dismiss, the district judge may consider whether the Knight equal protection claim can better be resolved in the Middle District of Alabama.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

No. CV 83-C-1676-S.

UNITED STATES of America

Plaintiff,

v.

The STATE OF ALABAMA; et al.,

Defendants.

[Filed March 16, 1984]

OPINION ON MOTIONS FOR RECUSAL

DYER, Senior Circuit Judge, Sitting by Designation.

The United States instituted this action against the State of Alabama and its state institutions of higher learning, including Auburn University, alleging that the defendants are maintaining and perpetuating racial segregation. The case was routinely and randomly assigned to Judge U.W. Clemon. Auburn University and Wayne Teague, the State Education Commissioner, filed motions to disqualify Judge Clemon pursuant to 28 U.S.C. §§ 144 and 455.

Judge Clemon did not reach the sufficiency of the affidavits' averments but denied the motions because the affidavits were executed by counsel instead of the parties. Auburn and Teague then filed a motion for reconsideration

accompanied by affidavits properly executed by the parties. Judge Clemon denied the motion on the ground that § 144 permits a party to file only one affidavit in any case.

After a hearing, Judge Clemon, by opinion, denied the motion based upon § 455. On petition for Mandamus by Auburn and Teague, the Court of Appeals, without expressing any opinion on the ultimate question of disqualification, remanded the case "with directions that another judge be assigned to hear the recusal proceedings."[1]

The identical affidavits filed by Auburn and Teague generally allege three grounds for disqualification which may be summarized as follows:

1. Judge Clemon's minor children are possible members of a class of black school children seeking to intervene, suggesting the possibility of the appearance of a personal interest in the outcome of the case.

2. While in private practice Judge Clemon appeared as attorney of record for individual plaintiffs in a statewide desegregation case which may have provided him with access to factual matters disputed in the present case.

3. Judge Clemon's prior association with former Senator Stewart, who is now a member of the firm representing Alabama A & M in this action, creates the "possibility of the appearance of personal bias."

For the reasons discussed hereafter, the averments of the affidavits are insufficient, as a matter of law, to require disqualification under § 144. The affidavits, together with the evidence presented, also fail to support disqualification under § 455. Accordingly, the motions are denied

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[1] For the reasons explicated at the hearing on the motions this court held that it would hear, consider and decide the question of disqualification under both 28 U.S.C. §§ 144 and 455.

and the case is reassigned to Judge Clemon for disposition of the case on the merits.

THE LEGAL SUFFICIENCY OF DEFENDANT'S AFFIDAVITS UNDER 28 U.S.C. § 144.

Section 144[2] requires a district judge's recusal when a party files a "timely and sufficient" affidavit alleging personal bias or prejudice against that party or in favor of an adverse party. *Parrish v. Board of Commissioners*, 524 F.2d 98, 100 (5th Cir.1975, *en banc*), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). An affidavit in this circumstance is legally sufficient only if it sets forth facts and reasons for the party's belief "which give fair support to the charge of a bent of mind that may impede impartiality of judgment." *Parrish*, 524 F.2d at 100 (quoting *Berger v. United States*, 255 U.S. 22, 23 (1921)). Further, the judge must assume the truth of the matters alleged and limit his determination to the legal sufficiency of the averments. *See Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481; *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1051 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).

Since § 144 requires recusal merely on the basis of a party's belief that a judge is biased, without questioning the veracity of the affiant's allegations, it invites abuse.

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[2] Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. 28 U.S.C. § 144 (1976)

Thus, the statutory standards for compliance are strictly construed. In *United States v. Haldeman*, the court detailed the stringent requirements for legal sufficiency under § 144:

> Section 144 specifies that "[t]he affidavit supporting a motion thereunder 'shall state the facts and the reasons for the belief that bias or prejudice exists,' " and it does so for the best of reasons. This provision, like the accompanying mandate that counsel of record certify that the affidavit is made in good faith, was designed to guard against groundless claims and the impositions they would inflict on the judicial process. To achieve that end, the courts have consistently held that the affidavit must meet exacting standards. It must be strictly construed; it must be definite as to time, place, persons and circumstances. Assertions merely of a conclusionary nature are not enough, nor are opinions or rumors. And the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

559 F.2d 31,134 (D.C.Cir.1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). (footnotes omitted).

In addition, the strength of the averments is tempered by a presumption of the judge's impartiality. "Since a judge is presumed impartial, the party seeking recusal has a substantial burden to overcome the presumption with factual allegations of personal bias stemming from extrajudicial source." *United States v. Baskes*, 687 F.2d 165, 170 (7th Cir.1981).

To determine whether disqualification is required under § 144, the allegations contained in the affidavits of Auburn and Teague must be scrutinized. If they support "the charge of a bent of mind that may prevent or impede impartiality of judgment" on any of the three grounds raised by the affidavits, recusal is required.

An analysis of the sufficiency of the allegations must begin with the test adopted by the Fifth Circuit in Parrish. There the court, quoting *United States v. Thompson*, set forth the three requirements for a legally sufficient affidavit as follows:

> "In an affidavit of bias, the affiant has the burden of making a three-fold showing:
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> 1. The facts must be material and stated with particularity;
>
> 2. The facts must be such that, if true they would convince a reasonable man that a bias exists;
>
> 3. The facts must show the bias is personal, as opposed to judicial, in nature."

524 F.2d at 100 (quoting *United States v. Thompson*, 483 F.2d 527, 528 (3d Cir.1973).

Application of the *Parrish* test to the present affidavits demonstrates their failure to state material facts with sufficient particularity to convince a reasonable man that a personal bias exists. The affidavits begin by stating that "the judge before whom the cause is pending has a personal bias or prejudice either against said defendant or in favor of parties to the action whose interests may be adverse to such defendant." This initial conclusory allegation is "general or impersonal" at best and is insufficient to allege the requisite personal bias for disqualification. *See, Parrish*, 524 F.2d at 101. It is unclear what is alleged: bias against Auburn and Teague or in favor of the plaintiff. The confusion persists through the affidavits. The remaining averments generally allege three grounds for disqualification.

Judge Clemon's Involvement in *Lee v. Macon County Board of Education.*[3]

Lee v. Macon was a massive school desegregation case instituted against the State of Alabama in 1970. It involved ninety-nine school systems, all of the trade schools and junior colleges, plus four of the four-year institutions named as defendants in the present case which were at one time subject to the control of the State Board of Education. The averments detailing Judge Clemon's involvement in *Lee v. Macon* may be summarized as follows:

1. Judge Clemon, while in private practice appeared as attorney of record for individual plaintiffs.

2. *Lee v. Macon* included claims under Title VI of the Civil Rights Act of 1964 against institutions of higher learning in Alabama involving claims of racial discrimination during periods of time relevant to the present case.

3. Judge Clemon, and the law firm that he was associated with, received copies of all pleadings, paid a filing fee for a Notice of Appeal, and provided other assistance in securing the appeal.

4. Judge Clemon was involved in the case, as an attorney, as early as 1971.

5. Certain state colleges named as defendants in *Lee v. Macon* are named as defendants in this action. Jurisdiction over these defendants was transferred to the Northern District of Alabama on May 30, 1972.

6. Since the transfer, the court file relating to these defendants "are not closed, but have vitality and are currently assigned to various judges for supervision of work."

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[3] Civil Action No. 70-251, N.D.Ala.

7. From 1967 through 1968 Judge Clemon, while a law student, was employed by the NAACP Legal Defense and Education Fund, a leading force in the *Lee v. Macon* litigation in the Middle District of Alabama.

8. As a result of his role as attorney of record in *Lee v. Macon* and his employment by the Defense Fund, Judge Clemon had access to disputed factual matters allegedly relevant in the case at bar concerning conduct by institutions of higher learning in the State of Alabama, including many of the present defendants.

These allegations present a general claim lacking in the particularity necessary, under the *Parrish* test, to convince a reasonable man that bias exists. The allegations concerning Judge Clemon's involvement in *Lee v. Macon* are limited to appearing as attorney of record, paying of a filing fee and assisting in obtaining an appeal. The affidavits fail to state for which plaintiffs Judge Clemon was "attorney of record". Given the magnitude of the case, it is likely as not that the interests of plaintiffs represented by Judge Clemon were completely isolated from any claim which affected institutions of higher learning, including Auburn. Auburn and Teague claim only that "the action [*Lee v. Macon*] included claims of racial discrimination against institutions of higher learning in the State of Alabama." *Lee v. Macon* was not limited to claims against institutions of higher learning and the affidavits fail to allege any facts which would connect Judge Clemon to that aspect of the case.

The affidavits do not demonstrate a personal bias on the part of Judge Clemon. Rather, they allege that he had access to disputed facts relevant to the present case. The affidavits do not indicate what facts Judge Clemon had access to or how they are relevant to the present case. They do not even suggest enough details to indicate that

the facts that Judge Clemon had access to are of the nature that would affect his impartiality or cause a personal bias. The affiants merely allege that Judge Clemon had some contact with an unidentified aspect of the case through his representation of individual plaintiffs and that prior to the filing of the action, while Judge Clemon was a law student, he was employed by an agency that was a motivating factor in bringing the action. These allegations do not support or even suggest the personal bias required. Affiants' reliance on *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) is misplaced.

Grinnell simply precludes disqualification where the bias alleged is not extrajudicial. While the bias alleged is admittedly extrajudicial in the present case, it is insufficient to establish a personal bias under the *Parrish* test. At most, the allegations support only the inference that Judge Clemon's background as a civil rights attorney and his race cause him to be inherently biased and incapable of rendering an impartial decision in a school desegregation case.

A claim that is essentially an allegation based on the judge's background and which states no specific facts that would suggest he would be anything but impartial in deciding the case before him is insufficient. *Parrish*, 524 F.2d at 101. In *Parrish*, the trial judge was not disqualified from a racial discrimination case even though he had been president of a bar association whose charter barred black members. The court in *Parrish* held that the factual base alleged for recusal did not raise an inference of personal bias or prejudice. *Id.* The fact that Judge Clemon has represented plaintiffs in racial discrimination actions provides no additional support for the claim of bias. The facts set forth in the affidavits

> ". . . show no personal bias on the part of the judge against any of the defendants, but, at most, zeal for

> upholding the rights of Negroes under the Constitution and indignation that attempts should be made to deny them their rights. A judge cannot be disqualified merely because he believes in upholding the law, even though he says so with vehemence."

Baskin v. Brown, 174 F.2d 391, 394 (4th Cir.1949).

The question underlying the allegations in the present affidavits is whether a black judge should be disqualified *per se* from adjudicating cases involving claims of racial discrimination. *Pennsylvania v. Local Union 542*, 388 F.Supp. 155, 165 (E.D.Pa.1974). It is clear that a judge's color, sex or religion does not constitute bias in favor of that color, sex or religion. *See Menora v. Illinois High School Assoc.*, 527 F.Supp. 632 (N.D.Ill.1981); *Blank v. Sullivan and Cromwell*, 418 F.Supp. 1, 4 (S.D.N.Y.1975). In *Pennsylvania v. Local Union 542*, Judge Higginbotham denied a motion seeking his recusal from an employment discrimination case on the ground that he exercised a "significant role as a spokesman, scholar and active supporter of the advancement of the causes of integration." 388 F.Supp. at 157. Judge Higginbotham noted that requiring black judges to recuse themselves from racial discrimination cases would result in a double standard within the federal judiciary. *Id.* at 165. The allegations of the present affidavits only illustrate that Judge Clemon, like Judge Higginbotham, is an active supporter of "the cause of integration" and fail to show a personal bias against Auburn, Teague or any of the present defendants.

Judge Clemon's Children as Possible Class Members.

The affidavits allege that Judge Clemon has two minor children who are members of a putative class seeking to intervene in this action. The class includes students matriculating in institutions located in the State of Alabama and presently studying in grades commonly known as elementary or high school. The defendant suggests "the possibility of the appearance of a personal interest in the

outcome of the action" created by Judge Clemon's failure to disqualify himself under the circumstances.

As previously noted, § 144 plainly requires an allegation of personal bias, not the appearance of a personal bias or personal interest. The fact that Judge Clemon has two children of school age in the State of Alabama who may indirectly benefit from a ruling adverse to the defendants in this action should not convince a "reasonable man that a bias exists." *Parrish*, 524 F.2d at 100. The interests claimed are too tenuous and remote. There is no allegation that Judge Clemon's children intend to enroll in any of the defendant institutions of higher learning. The class of intervenors, not yet certified, includes nearly every black child in Alabama. Defendants would suggest then that every black judge, with minor children in the state, would be precluded from presiding in a school desegregation case. This reasoning once again suggests only an inference of inherent bias based upon the judge's race.

Judge Clemon's Prior Association with Former Senator Stewart.

The final ground for disqualification raised in the affidavits allege that Judge Clemon's relationship with former Senator Stewart, who is now a member of the firm representing Alabama A & M in this action, creates the "possibility of the appearance of personal bias." This allegation fails under § 144 because it only alleges the appearance and not the existence of personal bias as required under the *Parrish* test. The facts contained in the averment do not otherwise support the allegation.

Auburn and Teague allege that during his tenure as a United States Senator from Alabama, Mr. Stewart sponsored the nomination of Judge Clemon to the Federal Bench. They also state that "Mr. Stewart was so actively involved in Judge Clemon's nomination to the Bench that the American Bar Association criticized Judge Clemon" for making a $500 political contribution to Mr. Stewart.

Although Alabama A & M was originally a defendant in this action, it now seeks to be realigned as a plaintiff. Affiants assert that the primary factor motivating the request to be realigned is that as a plaintiff, Alabama A & M would have attorney's fees available as a form of relief. The affidavits further allege that in formulating the appropriate award of attorney's fees, Judge Clemon would be required to consider the reputation and quality of legal work performed by former Senator Stewart's firm.

Section 144 requires recusal when personal bias or prejudice against that *party* or in favor of an adverse *party* is alleged. *See, Parrish*, 524 F.2d 98. A party as used in § 144 does not include counsel as such. *Davis v. Board of School Commissioners*, 517 F.2d 1044 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). In *Davis*, intervenors filed affidavits alleging bias based upon a controversy between the judge and the affiants' attorney. The court found the affidavits legally insufficient because there was no basis for imputing bias against the attorney to the affiants. *Id.* at 1051.

In sum, this court finds the averments of the affidavits, taken as true, are facially insufficient to show personal bias or prejudice of Judge Clemon.

We now turn to the motions for recusal of Judge Clemon under § 455.[4] Auburn bases its § 455[5] claims on the three

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[4] The motions of Auburn and Teague for recusal under this section are identical. For the sake of brevity we refer simply to Auburn.

[5] § 455 of 28 U.S.C. (1976) provides in pertinent part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts con-

grounds raised in its § 144 affidavit and on several additional grounds. Auburn supplements its *Lee v. Macon* claim by pointing out two other instances where Judge Clemon, while in private practice was involved in an adversary proceeding involving allegations of racial discrimination in higher education. Auburn also contends that public statements made by Judge Clemon concerning the recusal proceedings demonstrate "a personal bias concerning a party", and that the judge's "impartiality might reasonably be questioned" as a result of these statements, together with publicity surrounding the recusal efforts. Each of these assertions, discussed hereafter individually, fail to support an independent basis for disqualification

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cerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

under § 455. The fact that multiple grounds have been raised fails to buttress the claim. As Judge Arnow stated in *Miller Industries v. Caterpillar Tractor Co.*:

> In determining the necessity for disqualification, all circumstances bearing upon it should be considered. But that does not mean that various circumstances, each insufficient standing alone, mandates sufficiency in total. Under the factual situation here presented, holding that these various circumstances in combination require disqualification would be tantamount to holding that adding several zeros together would produce something more than zero.

516 F.Supp. 84, 87 (S.D.Ala.1980).

> Judge Clemon's Participation in Adversary Proceedings Involving Charges of Racial Discrimination in the State's Education System.

In addition to *Lee v. Macon*, Auburn notes Judge Clemon's involvement in the *Afro-American Association of the University of Alabama v. Bryant*, CA. No. 69-422 (N.D.Ala.), and *In re Alabama Educational Television Commission*, Docket No. 20276. Auburn contends that Judge Clemon's involvement in each of these cases provides an independent basis for disqualification under § 455.

Section 455(b)(1) requires disqualification where a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Section 455, unlike § 144, does not require the judge to accept all allegations as true. *Phillips v. Joint Legislative Committee*, 637 F.2d 1014, 1019 n. 6 (5th Cir.1981), *cert. denied* 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982). Nevertheless, the standard under § 455(a) is stricter than § 144. *Id.* While § 144 requires allegations sufficient to convince a reasonable man that bias exists, under § 455(a) the allegations must show only that a reasonable person would harbor doubts about the

judge's impartiality. *Id.* In determining when the appearance of impropriety might occur under § 455(a), the reasonable person test is used. *Huff v. Standard Life Insurance Co.*, 683 F.2d 1363 (11th Cir.1982). "The reasonable person is presumed to possess knowledge of all the circumstances" under § 455. *Id.* Consideration of all the facts and circumstances surrounding each of these claims dispells all reasonable doubts as to Judge Clemon's impartiality.

The facts demonstrate that the *Lee v. Macon* case is not the same "matter in controversy" under § 455(b)(2) and that Judge Clemon did not have access to disputed evidentiary facts under § 455(b)(1). Auburn argues that the claim of plaintiff in the present action that the State of Alabama has conducted a dual system of higher education since 1953 makes the conduct of other defendants, not Auburn, who were named as defendants in *Lee v. Macon* relevant to the present case. Auburn contends that by representing plaintiffs in *Lee v. Macon*, Judge Clemon was dealing as attorney with some of the facts that are in dispute now. This claim is without foundation.

Judge Clemon's testimony reveals that he became involved in parts of *Lee v. Macon* only after it was fragmented into nearly 100 separate actions and divided among various districts and divisions in the state. At that point *Lee v. Macon* was logically and legally many different cases. Judge Clemon stated that he never participated in aspects of the case involving higher education. His involvement was limited to the public school systems of Sumnter County and the City of Anniston. Each of the separate school systems included in *Lee v. Macon* have been treated separately since the transfer.

When the college and university aspect of *Lee v. Macon* was transferred to the Northern District of Alabama, the only present defendant remaining under the control of the State Board of Education was Alabama A & M University.

Since the transfer in 1972, the only action involving the institutions of higher learning was the severance of a complaint in intervention against Livingston University.

Auburn relies on *W. Clay Jackson v. Greyhound Leasing*, 467 F.Supp. 801 (D.P.R.1979), for the proposition that access to information requires recusal under § 455. In *Clay*, the trial judge admitted that a reasonable doubt had been created in his own mind that facts may have come into his knowledge while acting as labor counsel to one of the parties. *Id.* at 803. Clay may be distinguished from the present case because Judge Clemon has expressly disavowed any knowledge of facts in *Lee v. Macon* pertaining to institutions of higher learning.

In *Laird v. Tatum*, 409 U.S. 824, 829, 93 S.Ct. 7, 10, 34 L.Ed.2d 50 (1972), Justice Rehnquist refused to recuse himself although he had been a witness for the Justice Department in Senate hearings inquiring into the same subject matter. In so doing, he noted that none of the Supreme Court Justices since 1911 had followed a practice of recusing themselves in cases involving points of law with respect to which they had expressed an opinion or formulated a policy prior to ascending the Bench. *Id.* at 831, 93 S.Ct. at 11.

Even applying the objective standard of § 455(a), a reasonable man knowing all of the circumstances would not believe Judge Clemon's involvement in *Lee v. Macon* could have provided him with personal knowledge of disputed facts or otherwise create a doubt as to his ability to remain impartial. The allegations concerning Clemon's employment as a librarian at the NAACP Legal Defense Fund add no weight to Auburn's argument. Judge Clemon has denied acquiring any knowledge of any facts involving *Lee v. Macon* while so employed. It would seem unlikely that Judge Clemon's employment as a law student librarian would cause a reasonable person to "harbor a doubt as to the Judge's impartiality." *Potashnick v. Port City Con-*

struction Co., 609 F.2d 1101, 1111 (5th Cir.1980), cert. denied, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

According to the Report of the House Judiciary Committee, the 1974 amendments to § 455 were designed to bring the statutory grounds for disqualification into conformity with Canon 3 of the Code of Judicial Conduct which requires a judge to disqualify himself if there is a reasonable factual basis for doubting the judge's impartiality. H.R.Rep. No. 93-1453, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.Code Cong. & Admin.News, pp. 6351, 6352-55. The report noted, however, that "[D]isqualification must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial." *Id.*

Judge Clemon's involvement in *Lee v. Macon*, as well as the other noted adversary proceedings, does not evidence any basis for imputing a lack of impartiality or appearance of bias on the part of Judge Clemon, but rather, indicates the possibility of a particular judicial leaning. Allegations of such predispositions based upon background alone is insufficient to support disqualification. *See Phillips*, 637 F.2d at 1021; *Blank v. Sullivan and Cromwell*, 418 F.Supp. at 4; *Pennsylvania v. Local Union 452, International Union of Operating Engineers*, 388 F.Supp. at 159.

The Afro-American Claim

Auburn amended its Motion to Disqualify to include the allegation that Judge Clemon's representation of plaintiffs in the *Afro-American Association of the University of Alabama v. Bryant* requires disqualification under § 455. *The Afro-American* action was filed on July 2, 1969 and was dismissed with prejudice on May 10, 1971. The complaint alleged that the University of Alabama was failing to re-

cruit black athletes and was failing to award them scholarships. The plaintiffs charged violation of equal protection under the Fourteenth Amendment and requested injunctive relief to require the university to recruit black athletes and provide them with financial assistance. In addition, an injunction was sought under Title VI of the Civil Rights Act of 1964 against the Secretary of HEW to require him to cut off federal funds if the alleged racially discriminatory practices did not cease.

On March 4, 1970, the court dismissed the Secretary of HEW and the Title VI claim for failure to exhaust administrative remedies. The case settled before trial.

Auburn claims here, as in *Lee v. Macon* that the *Afro-American* case is the same matter in controversy under § 455(b)(2); that Judge Clemon's participation in *Afro-American* provided him with access to disputed evidentiary facts under § 455(b)(1) and that his involvement in the case would cause his impartiality to be reasonably questioned under § 455(a).

The *Afro-American* case and the present case do have the common thread of racial discrimination claims. Nevertheless, the cases, though similar are not the same for purposes of § 455. The *Afro-American* claim presented questions of the denial of equal protection to black athletes by Auburn's policies and practices as they existed thirteen years ago. In contrast the present action challenges the vestiges of *de jure* segregation currently existing in Alabama's institutions of higher learning. Both the legal theories and the relevant facts pertaining to the cases are different. To hold that the actions are the same "matter in controversy" under § 455 would suggest that Judge Clemon is precluded from presiding over any kind of race discrimination claim against Auburn or any of the defendant institutions. Such reasoning overreaches the intent of § 455.

Auburn also claims, under § 455(b)(1) that Judge Clemon, as a result of his role in *Afro-American*, acquired knowledge of disputed evidentiary facts concerning the present proceeding. Auburn has not particularized any such facts and their knowledge cannot be inferred under the circumstances.

The lapse of time, dissimilarity in the claims and lack of overlap in disputed facts makes it unreasonable to conclude that Judge Clemon's impartiality might be questioned. *See School District of Kansas City v. Missouri*, 438 F.Supp. 830 (W.D.Mo.1977).

The FCC Proceedings

Auburn characterizes this claim as the third instance of Judge Clemon's participation in an adversary proceeding involving charges of racial discrimination in the State's Educational system during the relevant time period. This characterization is misleading. Judge Clemon acted as attorney, and later as Chairman of the Board of the Alabama Citizens for Responsive Television (ACRPT). The organization proposed transfers from Auburn University and the University of Alabama to traditionally black colleges, public and private. The Alabama Educational Television Commission (AETC), a state agency, was empowered to control use of channels reserved by the FCC for educational use, to designate locations of stations, to utilize such channels, and to contract with persons including educational institutions for operation of such stations.

In 1975, the FCC found the AETC guilty of a racially discriminatory policy in programming but permitted it to apply for a new license. The actions cited by Auburn relate to ACRPT's competitive petition. Testimony of Wilbur H. Hinton, manager of AECT reveals that AECT is a separate entity from the universities. The relationship between AECT and Auburn is purely contractual. Alabama A & M and other universities have production centers that

produce programs for the network. Any racial discrimination charges would thus relate to AECT's activities in programming and purchasing and would have no bearing on university activities.

This claim fails to support any basis for disqualification under § 455.

The Stewart Claim

This claim fails under § 455 for the same reasons as stated under § 144. Sections 455 and 144 are to be construed *in pari materia*. *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1052 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). Thus, in passing on the issue of disqualification, the basis of conduct which shows bias or prejudice or lack of impartiality must focus on the party rather than counsel. *Id.* Auburn has not demonstrated any facts which would lead a reasonable man to conclude that Judge Clemon's association with former Senator Stewart will affect his ability to remain impartial. Unlike the judge in *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.1980), Judge Clemon did not participate with Mr. Stewart in any business ventures; he was not personally represented by Mr. Stewart as an attorney and he has not maintained an ongoing social relationship with Mr. Stewart. *See, Huff v. Standard Life Insurance Co.*, 683 F.2d 1363 (11th Cir.1982).

Judge Clemon's Children

Auburn alleges that Judge Clemon's children, as potential class members, are parties to the present proceedings thus mandating disqualification under § 455(b)(5) and that the children have a substantial interest in the litigation requiring disqualification under § 455(b)(4). Once again, this claim is too tenuous and remote. The class defined sweeps so broadly that it places all judges with school-age

children in Alabama in either a class or a counter- class. To employ Auburn's reasoning would require disqualification of all judges with such school-age children. The interests claimed to be affected are uncertain and contingent upon Judge Clemon's children choosing to attend one of the defendant institutions at some unknown date in the future. These interests are clearly not the substantial interests contemplated under § 455.

Publicity Surrounding the Recusal Proceedings.

As the final ground for disqualification raised under § 455, Auburn alleges that Judge Clemon has a personal bias or prejudice concerning a party as demonstrated by statements made by Judge Clemon to various newspapers concerning his disqualification by Judge Grooms.[6] Auburn also contends that the statements, together with the publicity surrounding the recusal proceedings, might cause a reasonable person to question Judge Clemon's impartiality under § 455(a).

Judge Clemon's statements to the press do not demonstrate any personal bias or prejudice concerning a party. Clemon's statements are limited to his reasons for denying the disqualification motion and his disagreement with Judge Groom's contrary ruling. Since the statements do not mention the parties, they cannot reflect a personal bias concerning a party. As noted, previously, the standard is the same under §§ 144 and 455. To support an allegation of bias the prejudice shown must be personal concerning a party. *Davis*, 517 F.2d 1052.

Publicity alone cannot create a reasonable doubt as to the judge's impartiality under § 455(a). In *In re United*

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[6] Upon remand, the Chief Judge of the Northern District of Alabama assigned this matter to Senior Judge H.H. Grooms. After a hearing, Judge Grooms issued an opinion and order requiring that Judge Clemon be disqualified. On motion for rehearing, Judge Grooms vacated his order and recused himself from any further proceedings.

States, 666 F.2d 690, 695 (1st Cir.1981), the court faced with a similar publicity problem concerning recusal proceedings stated that "to the extent the doubts were created by representatives of the press shown to be not grounded in fact, they cannot require disqualification." The mere fact that the issue of disqualification of Judge Clemon has drawn the attention of the media, resulting in extensive coverage, is not, in itself, a good reason to reassign this case. The adoption of this view would lead to judicial abandonment of responsibility for the purity of the judicial process and ultimately undermine the independence and integrity of the courts.

The motions of Auburn and Teague to disqualify Judge Clemon pursuant to §§ 144 and 455 are severally denied.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DISTRICT

Civ. A. No. 83-C-1676-S.

UNITED STATES of America,

Plaintiff,

JOHN F. KNIGHT, JR., et al., individually and on behalf of others similarly situated,

Plaintiffs-Intervenors,

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY and ALABAMA A & M UNIVERSITY,

Realigned Plaintiffs,

v.

The STATE OF ALABAMA; George C. Wallace, Governor of the State of Alabama; the Alabama State Board of Education; Wayne Teague, State Superintendent of Education; Auburn University, a public corporation; Jacksonville State University, a public corporation; Livingston University, a public corporation; Troy State University, a public corporation; the University of Montevallo, a public corporation; the Board of Trustees for the University of Alabama, a public corporation; the University of North Alabama, a public corporation; the University of South Alabama, a public corporation; the Alabama Commission on Higher Education; and the Alabama Public School and College Authority,

Defendants.

[Filed December 7, 1985]
[Entered December 9, 1985]

OPINION OUTLINE

MEMORANDUM OF OPINION

CLEMON, District Judge.

Introduction

The merits of this case involve two issues: whether the State of Alabama operated a racially dual system of higher education, and, if so, whether the vestiges of the dual system have now been eliminated. In 1983, the United States initiated this action under 42 U.S.C. § 2000d, d-1, ("Title VI") and the Fourteenth Amendment to the United States Constitution against the State of Alabama, its publicly supported institutions of higher learning and related agencies and officials. Two defendants, Alabama A & M University ("A & M") and Alabama State University ("ASU"), were granted leave to realign themselves as plaintiffs.

Since the issues in *Knight v. James*, 514 F.Supp. 567 (M.D.Ala.1981), are subsumed in this case, the certified class in *Knight* was permitted to intervene herein and to assert its claims under Title VI and 42 U.S.C. § 1983.

After protracted, voluminous and often unnecessary discovery, the trial of the case commenced in, and consumed the month of July, 1985.

Based on the evidence adduced at trial, and for the reasons which follow, the court concludes that the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; and that in other respects, the "root and branches" of the dual system have not been eliminated.

I.

The Historical Development of the Dual System of Higher Education

As of May 17, 1954—the date of *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873

(1954)—the system of higher education in Alabama consisted of (1) the University of Alabama, (2) Auburn Polytechnic Institute, (3) Alabama State Teachers College, (4) Alabama A & M College, (5) Florence State Teachers College, (6) Jacksonville State Teachers College, (7) Livingston State Teachers College, (8) Troy State Teachers College and (9) Alabama College. By July 2, 1965—the effective date of Title VI—the University of South Alabama had been added to the system. The historical development of each of these institutions shall be discussed in turn.

University of Alabama

The University of Alabama is the flagship institution of higher learning in the State of Alabama.

In the 1819 statute granting statehood to the Alabama Territory, an entire township was reserved and appropriated to the state legislature "for the use of a seminary of learning." The education article of the Alabama Constitution of 1819 provided that there

> shall be and remain a fund for the exclusive support of a State University, for the promotion of the arts, literature, and the sciences; and it shall be the duty of the General Assembly, as early as may be, to provide effectual means for the improvement and permanent security of the funds and endowments of such institution.

A year later, the legislature enacted a statute providing "That a Seminary of Learning be and the same is hereby established, to be denominated The University of the State of Alabama." The University was formally organized in Tuscaloosa in 1831. For the next 129 years, no other state-supported institution of higher learning carried the word "university" in its title.[1] Until the Reconstruction period

[1] The short-lived exception, Alabama Colored Peoples University, is discussed at p. 1147.

of Alabama history, the University of Alabama was the only state-supported institution of higher learning in the state.

From its beginnings until 1956, the University of Alabama ("the University") did not admit black students, pursuant to the ironclad custom and policy of the State of Alabama requiring segregation of the races in all spheres of life. To be sure, the constitutional article and statute creating the University never referred to segregation; but the University board of trustees, consisting, among others, of the governor and state superintendent of education, was evermindful of and obedient to that provision of the 1901 Constitution which recites: "separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race".

In September, 1952, two black graduates of a private black college, Autherine Lucy and Polly Ann Myers, applied for admission to pursue graduate study at the University. The board of trustees considered the applications on June 1, 1953; and it deferred action on the matter, ostensibly pending a decision by the Supreme Court in *Brown*. The board communicated its action to Arthur Shores, counsel for the applicants, along with the suggestion "that his clients could find courses in subjects desired by them at Tuskegee Institute and the Alabama State College at Montgomery." *Brown* was decided on May 17, 1954; and a year later, the University had not acted on the application.

After a brief evidentiary hearing in the lawsuit, *Lucy v. Adams*, 134 F.Supp. 235 (N.D.Ala.1955), Judge Grooms of this Court found that although there was no written policy or rule excluding blacks from the University, there was a tacit policy to that effect; and he enjoined university officials from denying Lucy, Myers or other similarly situated blacks "the right to enroll in the University of Al-

abama and pursue courses of study, solely on account of their race or color." The injunction was entered on July 1, 1955. The University appealed the case to the Court of Appeals and sought review by the Supreme Court; and on October 12, 1955, the United States Supreme Court denied review. *Lucy v. Adams*, 134 F.Supp. 235 (N.D.Ala.1955); *aff'd* 228 F.2d 619 (5th Cir.1955); *cert. denied*, 351 U.S. 931, 76 S.Ct. 790, 100 L.Ed. 1460 (1955).

The University denied admission to Lucy and Myers in the fall semester of 1955, on the ground that their applications were tardy. Finally, on December 30, 1955, Judge Grooms ordered the university officials to admit Lucy for the second semester, commencing February 3, 1956.

President Carmichael of the University summarized its sentiment:

> [T]he court case which was decided on December 25, 1955, had been in litigation for three and a half years. . . . During that period the Board of Trustees sought through all legal means to maintain the historic tradition of segregation which they conscientiously believed to be in the best interests of all concerned. * * *
>
> Finally, when the last legal battle was decided adversely the trustees were faced with two alternatives, yielding to the court's decree or defying the law. * * [The lawyer-members of the Board of Trustees] as well as other members felt they had no choice but to comply with the court's decree. Accordingly, the Board voted to permit one of the litigants to enroll as a student in the University.

Autherine Lucy did indeed enroll at the University. Despite the denial of dormitory space and dining hall privileges to her by the board of trustees, she attended the first three days of classes. On the third day, February 6, 1956, a mob assembled and attacked her. She was hit with

an egg; but due to the intervention of campus patrolmen, she escaped serious injury. That night, the board of trustees met and voted to exclude Lucy from attending classes until further notice. This action was defended as a safety precaution under the police power of the university.

By February 29, the trustees had not lifted their order of exclusion; and following a show cause hearing that day, Judge Grooms ordered that "the order of suspension or exclusion" be terminated by March 5, 1956. He nonetheless found that the university trustees and officials had neither been derelict in their duty nor defiant of the earlier injunction, but that their action ". . .was taken in a good faith attempt to so protect the plaintiff and others."[2]

On the same day as Judge Grooms issued his order, the Board of Trustees met and unanimously adopted a resolution permanently expelling Autherine Lucy because of statements in her pleadings in which she expressed her belief that university officials had suspended her because of her color, and that they had conspired with others to violate the Court's order requiring her admission. Judge Grooms held that the Board of Trustees had properly expelled Autherine Lucy.

The University thus reverted to its all-white status; and remained so for another seven years.

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[2] The board member who testified in support of the indefinite suspension was of the opinion that Autherine Lucy "and the people who were sponsoring her and who were seeking to have her go to the University of Alabama" were deliberately trying to cause trouble and incite riot. Thurgood Marshall, co-counsel for Lucy, pressed the point:

> Q Mr. Caddell, what was done by Autherine Lucy or anybody connected with [her] on Monday, February 6 that was unlawful?
> A Well, Autherine Lucy came there in a Cadillac automobile; she had chauffers with her; she walked about on the campus in such a way as to I suppose, be obnoxious and objectionable and disagreeable.

A & M Exhibit ("AMX"), Transcript of 2/29/56 Hearing, p. 179.

In early 1963, three black students, Vivian J. Malone, Sandy English, and Jimmy A. Hood applied for admission to the University's main campus; two others, Marvin P. Carroll and Dave M. McGlathery, applied for admission to the University's Huntsville Extension Center. Their applications were not timely processed. On May 16, 1963, this Court ordered the trustees to process the applications and to admit the applicants if they were qualified. The Board minutes reflect that

> The Board was faced with a choice between the admission of some of the applicants or the outright disobediance of the order of the Federal Court with consequent prison sentences and other severe penalties for the Dean of Admissions and any successor appointed for him, and everyone else officially connected with the University, which punishment would not prevent such admission. It has therefore directed the Dean of Admissions to notify two negro applicants who have been found qualified of their admission to the University, one at the Huntsville Center and one at Tuscaloosa for the sessions which begin June 10, 1963.

The meeting at which this action was taken was called by Governor George C. Wallace and held at his office at the State Capitol in Montgomery. The Governor "wished his vote recorded against admission because of his position as the constitutional executive office [sic] of the State of Alabama responsible for the peace and tranquility of the State." United States Exhibit ("USX") 9c.

Thereafter, in an effort to prevent the federal court-ordered desegregation of the University,[3] Governor Wal-

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[3] It has been contended that the Governor was not motivated by a desire to prevent desegregation; rather that he was simply seeking to raise a grave constitutional issue concerning the usurpation of state powers by the federal government. A letter written by the Governor

lace publicly announced that he would "stand in the schoolhouse door" when the black students presented themselves for admission.

On June 10, 1963, United States President John F. Kennedy sent the following telegram to Governor Wallace:

> I am gratified by the dedication to law and order expressed in your telegram informing me of your use of National Guardsmen at the University of Alabama. The only announced threat to orderly compliance with the law, however, is your plan to bar physically the admission of Negro students in defiance of the order of the Alabama federal district court and in violation of accepted standards of public conduct. State, city, and university officials have reported that, if you were to stay away from the campus, thus fulfilling your

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three months after the event lays to rest this attempted revision of history. In that letter, the Governor says, *inter alia*,

> As we read the statistics of our Courts, Public Health Departments, we find that a vast majority of the crime committed in this area has been committed by members of the Negro race. . . . Their health records record the fact that a vast percentage of people who are infected with venereal diseases are people of the Negro race. Statistics from the Health Department also reveal the fact that an exceedingly high percentage of illegitimate children in this state and surrounding states are of the Negro race. We find that the Negroes are not aggresive in the respect of making progress and their own ability to live among themselves. * * * It is our firm belief that when God in Heaven made the Negro black, he meant for him to stay that way. Likewise when he made the white race white, He meant for them to be a pure race. *It is our further belief that when the two races mix and mingle in schools, from the first grade through college, this mixing will result in the races mixing socially,* which fact will bring about inter marriages of the races, and eventually our race will be deteriated [sic] to that of the mongrel complexity. * * * . . . if we can manage to keep our races from mixing, we shall always if we can manage to keep our races.
>
> Letter from Governor Wallace to Art Wallace, dated 9/13/63. AMX 14G. (emphasis added).

> legal duty, there is little danger of any disorder being incited which the local town and campus authorities could not adequately handle. This would make unnecessary the outside intervention of any troops, either state or federal. I therefore urgently ask you to consider the consequences to your state and its fine university if you persist in setting an example of defiant conduct, and urge you instead to leave those matters in the courts of law where they belong.

AMX 14B.

The Alabama National Guard was federalized by the President shortly thereafter. On the following day, when Vivian Malone and Jimmy Hood (escorted by United States Marshals) approached the Administration Building, they were met by Governor Wallace at the entrance. He was allowed to read a short statement; and the federalized Commander of the Alabama National Guard then asked the Governor to step aside. The Governor accommodated the request.

In the words of Governor Wallace: "At 3:33 P.M. (cst) June 11, 1963, through the use of Federal Troops [President Kennedy] assumed full responsibility for the presence of Negro students. . ." AMX 14E. Three days later, the President wired the Governor:

> Regretfully, it was necessary to send troops to Tuscaloosa to enforce the courts orders. Maintenance of law and order, however, remains your legal and moral responsibility. I know you were opposed to the admission of the Negro students, but that is now passed. They are attending the university, and I would like to withdraw the troops as soon as possible.

AMX 14A.

Governor Wallace's June 17, 1963 response to the President reads:

> I can and will guarantee that there will be no sustained violence in Alabama, but with our limited resources, physical and financial, Alabama cannot insure absolutely the personal safety of individual students. Surely you realize that a continuous cause of the tension in Alabama is the presence of the three Negro students on the campuses of the University, and I suggest that you immediately secure their withdrawal.
>
> * * * * * *
>
> You have created the situation existing in Tuscaloosa, Alabama. You must assume the responsibility. You cannot usurp the powers reserved to the State of Alabama and then place the burdens thereby created on my shoulders.

AMX 14H.

The evidence does not disclose the date on which the federal troops were removed.

On June 12, 1963, Governor Wallace reminded President Rose of the University that on the preceding afternoon, "President Kennedy with the use of armed Federal troops assumed control of the campus of the University of Alabama which includes the campus at Huntsville." In view of this "illegal and unwarranted military occupation," the Governor decided that he would not "stand in the door" of the Huntsville campus when Dave McGlathery presented himself. He promised that "we will continue relentlessly our fight against forced integration of the University of Alabama." AMX 14B.

The record evidence does not pinpoint the date on which the fight ended; but by 1965, there were 31 black students enrolled at the University of Alabama. Two years later, that number had increased to 119 blacks out of a total student population of 12,251.

Auburn Polytechnic Institute

Auburn University's roots extend to the East Alabama Male College, a denominational school which was started in 1859. Closed during the Civil War, the school reopened in 1866. In 1872, the Methodist Church offered the school to the state; the state legislature accepted it and named the school, "the Agricultural and Mechanical College of Alabama." It was designated as the land grant college of Alabama under the terms of the 1862 Morrill Act. The 1875 and 1901 Constitutions of Alabama expressly recognized the status of the school. Women were admitted in 1892; and in 1899, the name was changed to the Auburn Polytechnic Institute. In 1960, the name was again changed, this time to Auburn University ("Auburn").

From its inception until 1963, Auburn did not admit black students.[4]

In 1962, Harold A. Franklin, a black graduate of Alabama State University, applied for admission to the graduate school of Auburn University. He was denied admission by the Dean of Auburn's graduate school on the stated ground that Franklin's undergraduate degree was awarded by an unaccredited institution. In *Franklin v. Parker*, 223 F.Supp. 724 (M.D.Ala.1963), Judge Frank Johnson ordered Auburn to admit Franklin and

> . . . other qualified Negro applicants to the Auburn University Graduate School, without regard to any statute, policy, practice, custom and usage which may be contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

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[4] Because of this policy and custom which had the force of law, the legislature designated the Huntsville Normal School as the land-grant college for blacks in 1891 so that Auburn might continue receiving Morrill Act funds.

Id. at 728.

Governor Wallace, as chairman of the Auburn Board of Trustees, then intervened and, through his effort, Auburn University refused to grant dormitory space to Franklin, although the space admittedly was available. AMX 12A. Judge Johnson ordered Auburn to provide the dormitory space forthwith. Franklin was accordingly admitted to Auburn University on January 2, 1964.

Resistance to the desegregation at Auburn in the early sixties was spearheaded by the chairman of its board of trustees, the Governor. Dr. Ralph Draughon, President of Auburn, did not always agree with the Governor's tactics. When Draughon wrote to the Governor protesting the action of State Troopers in barring federal agents from the campus during the Franklin admission, the Governor responded:

> Of course, you and I were never in agreement relative to the proposition of integration at Auburn. As you will remember, it was your suggestion that Auburn voluntarily admit a Negro student. This never did and never will receive my approval.
>
> I will say that it is difficult for me to understand the lack of cooperation at Auburn University in that through my efforts the University now has its largest appropriation in the history of the State. My efforts in behalf of Auburn University have apparently had no effect on your attitude.

AMX 12B, p. 3.

The Board of Trustees named a new president in the following year. The new president was the first to sign a statement endorsing the Governor's opposition to the 1966 HEW Guidelines for school desegregation;[5] and when the

[5] The President of the University of Alabama apparently refused to endorse the Governor's position.

three-judge court handed down its decision in *Lee v. Macon County Board of Education*, 267 F.Supp. 458 (M.D.Ala.1967), the president of Auburn was again the first to sign a petition urging the Governor and the State Attorney General to request a stay of the judgment pending an appeal of the decision to the United States Supreme Court. AMX 18, 20.

Auburn was not a party in *Lee v. Macon*, and it had no legally cognizable interest in the case. Of course, these public positions of Auburn's president on matters of school desegregation did nothing to dispel the image of Auburn as an institution more concerned with preserving segregation than opening its doors to black students.

By 1970-71, there were only 71 (.6%) blacks among the 1,484 undergraduates enrolled at Auburn; there were 10 black graduate students out of a total of 662.

Alabama State Teachers College[6]

The institution now known as Alabama State University had its origins in Marion, Alabama. In 1867, Jabez L.M. Curry,[7] ex-confederate officer and former president of Howard College of Marion, organized a mass meeting of blacks in Selma, Alabama, for the purpose of setting up a school for blacks. As a result of this meeting, a black

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[6] The historical facts concerning Alabama State and A & M are based on the evidence and Horace Mann Bond's *Negro Education in Alabama: A Study In Cotton and Steel*. New York, Antheneum, 1969; Robert G. Sherer's *Subordination and Liberation: Development of Conflicting Theories of Black Education in 19th Century Alabama*. University of Alabama Press, 1977. These books are included in the bibliography of Auburn's land grant expert, Dr. William Warren Rogers; and pursuant to A & M's Request For Judicial Notice, they are so noticed.

[7] Curry later became the General Agent of the Peabody Fund and administration head of the Slater Fund, which donated millions of dollars to black and white schools in Alabama during the period 1868-1914.

school was set up at Marion in that year, with the assistance and financial support of the Conservative Party. In July of the following year, the Alabama Board of Education made an appropriation to the Marion Normal School from the black share of the common school fund.

In November, 1871, Peyton Finley, the black member of the State Board of Education, introduced two bills to the board. The bills provided for the creation of four schools for black teachers, and an equal number for white teachers. The bills were passed a month later; and $4,750 was divided among the black normal schools at Montgomery, Sparta, Marion and Huntsville.[8]

In 1872, the normal school at Montgomery was not funded; but the appropriation for the school at Marion was made permanent.

Peyton Finley was "a strenuous advocate of the establishment of a University for Negroes in the State, to do for the Negro what the University of Alabama purported to do for white persons." *Bond*, 107. At the first session of the Board of Education which he attended as a member, he presented a resolution urging the creation of a black university and petitioning Congress "for a grant of public lands in aid of such a University." Nothing ever came of this resolution. Later in the year (1871), Peyton introduced a similar bill; but a substitute amendment was adopted which doubled the appropriation for the school at Marion, in lieu of making it a university. Finally, in the latter part of 1873, a bill to establish a "State Normal School and University" was passed by the State Board of Education.[9] Lincoln Normal School, which had been operated by the American Missionary Society since 1866, was donated to the State for use as the campus of the new university;

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[8] $4,500 was to be divided among the white schools.

[9] During this period of Alabama history, the State Board of Education was empowered to enact laws dealing with education.

and a board of directors, consisting of the state superintendent of education and five black citizens, was the governing body of the university.

In 1874, there were one hundred black students enrolled at "normal University." Its appropriation of $2,000 (compared with the $2,400 yearly income of the University of Alabama) was doubled the following year. The school had three white faculty members; and the newly elected Democratic school superintendent wrote:

> The normal school at Marion is designed to become a University for the colored race in the State; and it is not doubted that its facilities for furnishing the higher education to this race will be amplified as the demand therefor becomes apparent.

Bond, 110.

In 1878, William Burns Paterson was elected president of the State Normal School and University at Marion. Of Scottish birth, he had come to the United States as an immigrant eleven years earlier. He worked at odd jobs from New York to Hale County, Alabama, in which he settled in 1870. Over the opposition of local whites to a white person teaching black people, Paterson set up the Tullibody Academy in Greensboro for the education of black freedmen. Tullibody Academy was so well-respected seven years later that Burns was chosen to head the State Normal School and University, also known as Lincoln Normal University.

The first curriculum at the Marion school was classical only. Between 1880 and 1885, the school developed a carpentry course for the male students. By 1885, Lincoln Normal University consisted of a main building, a small dormitory, and the president's residence. There were 10 faculty members—the only black being the head of the Industrial Department. Its enrollment in that year slightly exceeded 300; it had 17 in the graduating class.

In each of the next two years, pivotal events charted the course of the school. In December 1886, a riot ensued after several white cadets at Howard College (also located in Marion) shoved a Lincoln student off the sidewalk as they walked abreast. In apparent retaliation, the main building at Lincoln School was destroyed by arson; and the Marion city fathers demanded of the legislature that the school be either closed or moved to another city.

The legislature responded by appointing a committee, chaired by the Governor, to determine an appropriate place for the relocation of the school. Montgomery, Selma and Birmingham were considered; but the advocacy of the *Montgomery Advertiser* resulted in the decision to relocate the school in Montgomery in 1887.[10]

On February 27, 1887, the legislature enacted a bill "to establish the Alabama University of Colored People, and to provide for its support and maintenance." The Alabama Supreme Court described the legislation:

> It establishes a University, with the implied privileges and powers appertaining to such institutions of higher learning, and as contradistinguished from high schools, and even colleges. It is not subject to the supervision of the Superintendent of Education, in whom the constitution vests the supervision of the public schools.
>
> It provides for the appointment of trustees, who are empowered to elect a faculty, and such officers and agents as they deem necessary; to discharge any member of the faculty, or officer or agent, at their pleasure; to prescribe their duties, and fix their compensation; and generally, to govern and control the faculty and the University, "so that the students

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[10] Not without significance, Booker T. Washington of Tuskegee Institute (which had been founded with a $2,000 state appropriation only six years earlier and was only forty miles from Montgomery) secretly lobbied against relocating the school in Montgomery.

> therein may be taught in the best manner possible the things they are to live by, preferring always the English language and the industries, to an education for culture only."

Elsberry v. State, 83 Ala. 614, 619, 3 So. 804 (1887).

Upon the creation of Alabama Colored Peoples University at Montgomery, President Paterson secured the assistance of local black leaders; and on October 3, 1887, the university opened in the basement of Beulah Baptist Church with ten teachers and about 400 students.

A few months after the opening of the University, in February, 1888, the Alabama Supreme Court held in *Elsberry* that the act creating the university was unconstitutional, on the ground that the $7,500 annual appropriation for the university was to be taken from the school funds earmarked for the colored race. The Court reasoned that the school funds apportioned between the races must be appropriated for public schools; and that the Alabama Colored Peoples University was not a public school.[11]

Alabama Colored Peoples University therefore received no state funding for the 1888-89 school year.

On February 23, 1889, the Legislature reacted to the *Elsberry* decision by creating a State Normal School for Colored Students to be located in Montgomery with an annual appropriation from the colored school fund of $7,500. The State Board of Education was assigned the responsibility of operating the school. Three months later, the black community in Montgomery donated $3,300 in cash and $6\frac{1}{2}$ acres of land to the normal school. The school moved into its new quarters shortly after the beginning of the 1889-90 school term.

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[11] The opinion was written by Justice Clopton, a former representative in the Confederate Assembly and former president of the East Alabama Male Institute (the predecessor to Auburn Polytechnic Institute).

From the turn of the century until the forties, the State Normal School for colored students fared better at the hands of the State Board of Education and the State Legislature than the Agricultural and Mechanical College for Negroes.

By 1902, 56% of the 229 graduates of the State Normal School for blacks were teachers; only 25% of the 736 A & M graduates were teachers.

Between 1920 and 1929, all of the normal schools in Alabama operated under a two-year curriculum. In 1929, the normal schools became teachers' colleges with four-year courses of study; from that year until 1969, the black teachers college in Montgomery was known as "Alabama State Teachers College."

In January, 1949, Governor James E. Folsom appointed a "Committee on Higher Education for Negroes in Alabama." The Committee consisted of 35 distinguished citizens of Alabama, including the presidents of the black state-supported institutions, the State Superintendent of Education, and a Richard T. Rives of Montgomery, who was subsequently appointed to the United States Court of Appeals for the Fifth Circuit. In its final report, the Committee recommended that Alabama State College for Negroes "be developed as the State's University for Negroes," and that a law school for Negroes be established there. It further recommended that Alabama State be appropriated $695,000 annually (including funds for the law school and expansion of undergraduate and graduate curricula); and that $2,465,000 be appropriated to the college for capital outlay. These recommendations were never acted on by the legislature.

By the fifties, Alabama State College was offering the master's degree in education. Its undergraduate degree fields included secretarial science and music education. The curriculum had been broadened "to give preparatory col-

lege training for further study in medicine, law, theology, social work, library science, dentistry and nursing."

Alabama State was not accredited by the regional accrediting agency, the Southern Association of Secondary Schools and Colleges, until 1966; and its name was changed to Alabama State University in 1969. It remained under the control of the State Board of Education until 1975. Pursuant to the policy of its governing board, Alabama State could not admit white students until 1967; its first white student enrolled in the following year.

Alabama A & M College

William Hooper Councill was the single most important force in the origin and development of what was later to become Alabama A & M University. He was born into slavery; and by the time of emancipation, his family lived in Jackson County, Alabama. Largely self-taught, he moved to Huntsville in 1869 and opened a rural school for blacks about four miles west of Huntsville. In Huntsville, Councill became active in Reconstruction politics and was elected to the position of reading clerk in the Alabama Legislature, where he served from 1872-74. He was admitted to practice law in Alabama in 1883.

Two years after the State Board of Education enacted Peyton Finley's bill creating segregated normal schools, the Huntsville Normal School was established, with an annual appropriation of $1,000. In 1875, the school formally opened with Councill as its principal, and 61 students. For the next seven years, the classes were conducted in rented houses in Huntsville.

By 1882, the enrollment at the normal school had grown to 200; and the annual state appropriation had grown to $2,000. A $3,000 parcel of property had been purchased, and the two-story building on it had been remodeled for use as a school building.

With $1,000 donated to the school by the Slater Fund, Councill inauguated an industrial department of the normal school by 1885. Fifty-five students were receiving industrial training in carpentry, painting, printing, sewing, and horticulture. In the same year, the Legislature doubled the appropriation to the school;[12] and its name was formally changed to "Huntsville State Colored Normal and Industrial School."

Councill and the students of the Huntsville Normal and Industrial School were involved in separate racial incidents in 1887. While riding on a first-class railroad car from Tennessee to Atlanta in the summer of 1887, Councill was roughly evicted from the first class section. He filed a complaint with the newly created Interstate Commerce Commission, which ruled that Councill had not been treated equally and directed the railroad to provide equal service for blacks in the future. This incident caused no real problem with whites in Alabama.

During the same summer, however, several of the students of Huntsville Normal innocently entered the first-class railcar on the train from Huntsville to Decatur. The porter and conductor strongly protested; and, upon learning of the incident, the resulting hue and cry from local whites was so great that Councill tendered his resignation as principal. The resignation was promptly accepted by the all-white commissioners of the school, and they appointed a new principal. There followed such a groundswell of moral and financial support for Councill from within and outside the state that the commissioners were persuaded to reinstate Councill as principal of the school in 1888. He remained in this position until his death in 1909.

Congress enacted the Second Morrill Act in 1890, after it became clear that the Southern states had denied black

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[12] The state appropriation was not increased for the next third of a century.

citizens the right to attend the First Morrill Act land grant colleges. The Alabama Legislature set up a commission to determine which of Alabama's three black state-supported normal schools[13] would be designated as the black land grant school. Tuskegee Institute had the decided advantages: it had more buildings, more students, and the support of both of Alabama's senators.[14] These considerations were not enough to overcome the legislature's reaction to a speech of Booker T. Washington delivered in Montgomery ten days before the decision was to be made. In that speech, Washington attacked as unfair to blacks the School Fund Apportionment Law enacted by the legislature earlier that year; and, to the further consternation of the legislature, he challenged the practice of providing separate railroad cars for blacks. Councill, with the assistance of the ex-Confederate officers on his board, then successfully urged the Legislature not to grant the funds to a black school headed by a white man (i.e., Alabama State Normal School for colored students at Montgomery).

Washington's speech having rendered Tuskegee ineligible,[15] and President Paterson's color having disqualified Alabama State Normal School in Montgomery on February 13, 1891, the Huntsville State Normal School was designated by the legislature as the land grant school for blacks in Alabama.

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[13] Actually, by that time Tuskegee Institute, which had started as a normal school in 1881 with a $2,000 state appropriation, depended on Northern philanthropists for virtually all of its income.

[14] Senator Pugh introduced an amendment to the Act to permit the funds to go to schools which did not have "college" in their names; Senator Morgan publicly stated that the funds should go to Tuskegee, which has ". . . done more for the youthful colored population in that State than can be claimed by almost any other State in the South."

[15] Washington apparently learned his lesson well. Five years later, he delivered his famous Atlanta Exposition speech, in which he urged blacks to forego social and political equality with whites and to develop industrial skills.

After it had been designated as the black land grant school in Alabama, the commissioners of the Huntsville Normal School sold the campus in the City of Huntsville and moved the school to a new location four miles north of the city. This new site, at Normal, Alabama, had once been a plantation, race course, and an inn. It had several buildings which were used by the new school as faculty homes, offices, and shops. Palmer Hall, Seay Hall, a barn and a dairy were all constructed between March and August of 1891; and on September 1, the school opened at the new location.

Between 1893 and 1896, Councill became convinced that it would be impossible for blacks to attain full equality in the United States; and in his writings and speeches, he urged a gradual migration of blacks to Africa. This philosophy caused his school to lose both black and white support.

Five years after having designated the Huntsville Normal School as the state land grant school for blacks, the Legislature decided to establish two "agricultural experiment stations for the colored race and to make appropriations therefor." One of these was established at the Alabama State Normal School for colored students at Montgomery, to be operated by "its present board of trustees." The other was established at Tuskegee Normal and Industrial Institute; to be operated by a "board of control" consisting of the state commissioner of agriculture, the president of Auburn Polytechnic Institute, and the members of the Board of Trustees of Tuskegee Institute "who reside in the town of Tuskegee, Alabama." The 1896 decision to exclude the Huntsville Normal School from state-supported agricultural research was the beginning of nearly three-quarters of a century of rather blatant discrimination by the legislature and the State Board of Education against the black land grant school.[16]

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[16] Ironically, as Councill's (and thus A & M's) stock fell with the

In the same year, the Legislature changed the name of the school to the "Agricultural and Mechanical College for Negroes," and gave it the power to confer degrees.

From its inception until the summer of 1920, the governing board of A & M was a three-member board of commissioners, with the governor and the state superintendent of education as ex-officio members of the board. The 1894-95 catalog of the institution reflects that

> [t]he three Trustees or Commissioners representing the State of Alabama are all men of superior character, education, and wealth. All of them were slaveholders, and commissioned officers in the Confederate army.

State of Alabama Exhibit ("SX") 139, p. 17.

In 1920, the school was placed under the authority of the State Board of Education, where it remained until 1975.

Upon the death of Councill in 1909, his son-in-law, Walter S. Buchanan, was appointed to succeed him.

The Smith Lever Act, providing funds for agricultural extension work, was enacted by Congress on May 8, 1914. At that time, A & M's School of Agriculture was already engaged in extension work, and had been so involved since the 1890's. The 1913 catalog described this work:

> The agricultural extension work is intended to reach and help the large mass of farm workers among our people who cannot attend school. The following lines of extension work have been conducted during the past year and arrangements are being made to enlarge the work another year:
>
> 1. Farmers' Institute for the adult farmers.

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legislature, Booker T. Washington's (and therefore Tuskegee Institute's) stock rose.

2. Boy's Corn clubs for the boys from nine to eighteen years of age.

3. Girls' Tomato clubs for girls from nine to eighteen years of age.

4. School Farm clubs for the purpose of extending the school term and improving the condition of the school.

AMX 38, pp. 23-24.

In 1905-06, there were over 160 students enrolled in the four year college and normal departments of A & M. In 1913-14, there were only 36 students enrolled in the "Teachers' College" of A & M. There were 27 such students in 1914-15. During the same period, over 100 of the A & M students were enrolled in agriculture courses.

Nonetheless, A & M was not designated a co-recipient of Smith Lever funds. After losing in these efforts, A & M's financial condition progressively deteriorated. Its annual $4,000 state appropriation—lower than of any other state institution[17]—was not increased by the legislature until the school was placed under the control of the State Board of Education.

In fact, in 1918, the legislature appropriated only $1,000 to A & M.

A & M did not fare well under the state board of education. In the same year as it came under board of education control, it was reduced to a two-year curriculum—with emphasis on agricultural and industrial education. It

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[17] In 1916 and 1917, Alabama State's annual appropriation was $15,000. The white normal schools were appropriated $20,000.00 on the average in those years. The University of Montevallo received $54,427.68; and the University of Alabama received an annual $71,000 appropriation. Auburn's $87,280 was the highest state appropriation in those years.

did not resume its status as a four year school until 1939; while all the "Class A" schools and Alabama State reverted to four year teacher's colleges ten years earlier.

When the legislature established a graduate school in agriculture for blacks in 1945, it was placed at Tuskegee, rather than A & M. A total of $300,000 was appropriated for the establishment of this school; and a line-item appropriation of $100,000 was authorized.

Four years later, the legislature authorized the state board to provide courses for blacks in areas such as chemistry, engineering, vocational agriculture, and "such other educational services which in the opinion of the Board of Education is in great enough demand to justify a contract." SX 162. Instead of developing these courses at A & M, the Board of Education contracted with Tuskegee Institute for these courses.

By 1943, there were 562 students at A & M. Fifty-four of these were in agriculture, 118 were enrolled in mechanic arts, and 231 were in home economics. Further,

> several classes were taught for out-of-school rural youth in farm machinery repair, blacksmithing, wood working, and general farm production and conservation.
>
> A Farmers' Conference was held in February 1943, bringing to the campus more than 300 farm men and women. * * [T]he extension division served 179 off-campus workers.

SX 168.

In 1948, A & M's name was changed to "Alabama Agricultural and Mechanical College." In 1969, the board of education gave it its present name. It was accreditated by the Southern Association of Secondary Schools and Colleges in 1963.

Until the 1967 injunction in *Lee v. Macon*, A & M did not admit white students.

University of South Alabama

Beginning in 1942, the University of Alabama offered extension courses to whites in Mobile—the second largest city in the state. At that time, and until 1963, there was no other state-supported four-year institution serving whites in the Mobile area.[18] By 1963, the University's Mobile Center accommodated some 1,500 part time students.

The University of South Alabama ("USA") was created by the legislature in 1963. Upon its creation, the director of the University Mobile Center became its new president, and upon the request of the board of trustees of USA, the University Mobile Center ceased operations in 1964.

When USA commenced operations in 1964 and for the next three years, its doors were not open to blacks, pursuant to state custom and practice which had the force of law.

Alabama College

The University of Montevallo had its origins in an 1893 legislative act which established "an industrial school for the education of white girls in Alabama." In 1895, Montevallo was chosen as the site for the new school. The name became "Alabama College" sometime thereafter. Men were first admitted to the college in 1956, when the legislature designated Alabama College as the state's college of liberal arts.

In 1969, the Board of Trustees changed the name to the University of Montevallo.

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[18] Alabama State College operated a Mobile Extension Center at which black high school graduates could receive their first two years of college education.

As of 1965, the school was still operated for whites only, under the established custom and policy of the State.

Florence, Jacksonville, Livingston and Troy State Teachers Colleges

Florence, Livingston, Jacksonville, and Troy State Teachers Colleges were the result of Peyton Finley's efforts to establish normal schools.

In December, 1871, the State Board of Education enacted a law establishing "a normal school at Florence, Alabama, for the education of white male teachers." The opening of the school was made possible by an 1873 deed to the state of the grounds and buildings of Florence Wesleyan University. The new normal school was appropriated ". . . at least five thousand dollars of the general educational fund of the State apportioned to the whites." In its 1873 amendment to the act establishing Florence Normal, the board indicated that the school would provide for the education of white female, as well as male teachers.

In 1883, the state legislature established a normal school for "white female teachers" at Livingston, Alabama, and another for white "male and female teachers" at Jacksonville, Alabama. Both schools were initially operated by a board of directors.

In 1887, the legislature "permanently established in the City of Troy, Pike County, . . . a school for the education of white male and female teachers. . . ." A board of directors for the "State Normal School at Troy" consisted of nine trustees and the state superintendent of education. The state board of education subsequently took control of the school, and operated it as one of the four "Class A Normal schools."

By the turn of the century, each of these normal schools, as well as Alabama State Normal School for Negroes, had been placed under the control of the Board of Education.

The four white normal schools were designated, "Class A Normal Schools."[19]

In 1920, the Board of Education reduced the curricula of the Class A Normal Schools to two-years. Nine years later, the four-year curriculum was restored at the schools, and they were named "teachers colleges."

Historically, these white teachers colleges received considerably larger state appropriations from the Board of Education than the black colleges. The presidents of the white teachers colleges were consistently paid higher salaries than the president of ASU. Under the 1927 School Code, for example, the white normal schools were each appropriated $40,000 annually; the "State Normal School for colored teachers located at Montgomery" was appropriated exactly one-half of that amount.

Florence State College did not admit black students until 1963, when Wendell W. Gunn was ordered admitted to the school by this Court. There is no credible evidence that any other black students were admitted to the school prior to 1967.

Livingston University admitted its first black student on January 5, 1966. Not a single black had been admitted to the two other schools prior to the 1967 order in *Lee v. Macon County Board of Education*, 267 F.Supp. 458 (M.D.Ala.1967).

The Board of Education had direct involvement in the day to day administration of the two black colleges under its control. In 1921, for example, the board limited the debt-incurring authority of the president of A & M to $50. As late as 1960, the Board of Education expelled black ASU students after they had participated in a sit-in. *Dixon v. Alabama-State Board of Education*, 186 F.Supp. 945

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[19] The "Class B Normal Schools" were apparently white also; but they generally offered education below the collegiate level.

(M.D.Ala.1960); *rev'd*, 294 F.2d 150 (5th Cir.1961). In discussing Alabama State's lack of accreditation in 1963, Judge Johnson wrote:

> Thus, if there was a 'weakness' or graduate program 'insufficiently supported' by faculty and library or a 'very confused situation in the general administration' of the college, it was the responsibility of the State of Alabama, acting through its State Board of Education, to correct these matters instead of allowing these deficiences to continue.

Franklin v. Parker, 223 F.Supp. 724 (M.D.Ala.1963).

The Southern Association of Secondary Schools and Colleges did not admit black colleges to membership prior to 1956. In that year, Alabama State College was given probationary accreditation for five years. In 1961, accreditation was denied to both Alabama State College and A & M. All of the "Class A" schools were fully accredited. *Id.*, at 725, 726.

The Board of Education and the State of Alabama took various actions which had the effect of stymying the growth and development of both Alabama A & M and Alabama State College. Instead of setting up a School of Veterinary Medicine for blacks at the black land-grant school (since Auburn's School of Veterinary Medicine was by statute "for whites"), Tuskegee Institute was chosen instead. Therefore the annual appropriation went to Tuskegee, rather than to A & M. For a number of years, the state superintendent of education contracted with Tuskegee Institute to provide to black students "courses in engineering, veterinary medicine, and graduate courses offered in home economics and vocational agriculture;" and under this contract alone Tuskegee received $300,000 annually during the fifties. Obviously, these courses should have been developed at Alabama A & M, and the funds should have gone to that school. Rather than setting up

a nursing school at Alabama State College or A & M,[20] the state superintendent contracted with Tuskegee Institute to provide nursing education to blacks.

Until 1966, where black residents of Alabama desired to take a course or program offered by either the University of Alabama or Auburn, but unavailable at A & M, Alabama State College, or Tuskegee,[21] the state Board of Education funded the difference between the tuition and expenses at the University or Auburn and that of the college or university of their choice.

As of 1965, blacks had never been appointed to the governing boards of any of the institutions of higher learning in the state or to the State Board of Education. Faculties and staffs were rigidly segregated. Alabama State was operated as the black counterpart to the University of Alabama; A & M was the black counterpart to Auburn. The black institutions were unequal, in every objective sense, to the white institutions of higher learning.

The conclusion is inescapable that as of July 2, 1965, the State of Alabama continued to operate a racially separate and unequal system of higher education.

II

Development In The Period 1965-1975

In the 1965-1975 decade, six developments within the system of higher education impacted on its ability to disestablish its racial duality. The three-judge court handed down its decision in *Lee v. Macon County*; the University of Alabama at Huntsville ("UAH"), Auburn University at

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[20] Presently, there are nursing schools at each of the successors to the "Class A" schools; neither Alabama State College nor A & M has one.

[21] Tuskegee was considered only in those instances in which the superintendent had contracted with it for a particular course or program.

Montgomery ("AUM") and Troy State University at Montgomery ("TSUM") were established; Athens College became a part of the state system of higher education; and the Alabama Commission on Higher Education ("ACHE") was established.

On March 27, 1967, the three-judge panel in *Lee v. Macon* found that

> The State's trade schools, vocational schools and state colleges: continue to be operatEd on a segregated basis. The operation of these systems is the immediate responsibility of the State Board of Education.
>
> * * * * * *
>
> There is no necessity for setting out the facts in detail concerning the operation of these state colleges since the evidence conclusively establishes—the defendants do not controvert it—that these schools have been and continue to be operated as if *Brown v. Board of Education* were inapplicable in these areas.
>
> * * * * * *
>
> It is quite clear that the defendants have abrogated, and openly continue to abrogate, their affirmative duty to effectuate the principles of *Brown v. Board of Education, supra.* Although the facts as herein outlined speak eloquently for themselves, there is no more clear an indication of this than Superintendent Meadows' statement that he has done nothing to eliminate segregation in the public schools of Alabama.

267 F.Supp. at 474. The Court proceeded to order the Board of Education to admit blacks to the state colleges under its control, and to ". . . direct such . . . state colleges to recruit, hire, and assign teachers so as to desegregate faculty and to accomplish some faculty desegregation in each such . . . state college by September, 1967." 267 F.Supp. at 484.

Reaction was swift. Six years earlier, Governor Patterson had repeatedly urged the state legislature to remove the white colleges from the control of the board of education, so that desegregation efforts would be frustrated.[22] At the session of the legislature following *Lee v. Macon*, the legislature wasted no time in enacting Governor Patterson's proposal into law. Motivated by racial considerations, the white colleges thus received separate boards of trustees at the hands of the legislature, while Alabama State College and A & M remained under the control of the State Board of Education.

The University of Alabama started offering extension courses in the Huntsville area in the 1950's. The Army Ballistic Missile Agency was set up in Huntsville in 1956; and four years later, the Marshall Space Flight Center of the National Aeronautics and Space Administration ("NASA") was likewise established there. With the resulting influx of scientists, engineers, and other technicians in the Huntsville area, in the late fifties and early sixties, there was a demand for a graduate program in engineering and the sciences. A & M College was located in Huntsville, but it was never seriously considered as a source for these

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[22] Governor John Patterson made the following statement to a Joint Session of the Alabama Legislature on May 2, 1961:

> I wish to again recommend the enactment of a law placing our State colleges—with the exception of the Negro colleges—under the control of separate boards of trustees if they are not already under such boards. I make this recommendation because I see the need for further decentralizating control of our colleges due to continued attacks by race agitators to integrate our schools. This decentralizing would make it more difficult for these agitators to attack more than one college at a time. I believe the Negro colleges should remain under the control of the State Board of Education. I also recommend the enactment of a law placing the State trade schools under separate boards of trustees for the same reasons. The members of the Boards of Trustees should be appointed by the Governor for fixed and staggered terms, and the Governor should serve a sex-officio chairman of the boards in every case.

courses because it was a black school; and under the law and firmly established custom of the State of Alabama, white students could not attend it and white teachers could not teach there. The University's Huntsville Extension Center was the choice of the community, federal government officials and scientists; and as the community and federal government officials were well aware at the time, blacks could not attend the Extension Center.

As found earlier, Dave McGlathery became the first black to attend the Huntsville Extension Center in 1963. He was admitted only under a court order and the "military occupation" by federal troops of the "campus of the University of Alabama, which includes the campus at Huntsville," to enforce the order.

In 1963, UAH started offering degree programs at the master's level; and in the following year, undergraduate degree programs were offered. Doctoral programs in physics and engineering were first offered in 1971.

As of September, 1967, UAH offered programs in four divisions: engineering, general studies, natural sciences and mathematics, and graduate studies. The undergraduate degree programs consisted of: Bachelor of Arts in english, history, and mathematics; Bachelor of Science in physics and Bachelor of Science in engineering, with specializations in electronics, mechanics and systems. Master's degree graduate programs were offered as follows: Master of Science in physics; Master of Science in engineering. UAH offered no doctoral programs in 1967.

The UAH campus is in northwest Huntsville, adjacent to Research Park. Its 13 buildings were all constructed since 1960, and they contain modern equipment and exemplify modern functional design. The UAH main campus consists of 337 acres; it has two modern buildings for medical education and patient health care in a separate, ten-acre medical campus.

Both UAH and A & M are within the city limits of Huntsville.

Prior to 1967, the University of Alabama operated an Extension Center in Montgomery. The Extension Center offered three years of college work, but it did not offer degree programs. Alabama State College was the only four-year, degree-granting, state-supported institution of higher learning in the county. In 1966, the all-white Montgomery Chamber of Commerce reactivated its dormant Education Committee in an effort to establish a four-year state-supported institution for whites in the Montgomery area.

The Chamber of Commerce first approached the University of Alabama; it declined the invitation. Auburn University was next approached, and it agreed to undertake the project. Governor Wallace and the local white elected officials all gave their wholehearted support for the project.

Auburn made no independent study or investigation concerning the need or feasibility of a branch in Montgomery; it basically took the position that while it would do nothing to promote or secure a branch in Montgomery, it would operate a branch there if the legislature made an appropriation for such a branch and assigned it to Auburn.

The Montgomery Chamber of Commerce never considered the utilization or expansion of Alabama State, although the school had existing programs in liberal arts, business and teaching education, and continuing education for adults. The reason is simple: at the time, the Governor and the legislature would not have supported a racially mixed institution of higher learning in Montgomery.

At the very time that the Chamber negotiations with Auburn were being had, the Governor and the legislature were expressing their fury over the decision in *Lee v. Macon*, 267 F.Supp. 458 (M.D.Ala.1967), which had, among other things, required the desegregation of the senior col-

leges under the control of the State Board of Education. In an effort to thwart the decision, the legislature removed the white colleges from the control of the state board and placed them under separate boards of trustees.

On the same day that Governor Wallace signed the bills creating separate boards of trustees for the white teacher colleges, he signed a bill providing tuition grants to students who chose not to attend desegregated public schools; and he also signed the bill creating AUM and appropriating $5 million for its construction and operation.

Given the mood of the 1967 session of the legislature, it is apparent that it would not have considered the expansion of a black college so that it could serve white students.

AUM is located roughly five miles from ASU in Montgomery. According to the Auburn catalog, AUM ". . . has developed rapidly, especially since moving to a new 500 acre campus . . . in 1971."

Athens State College boasts that it "is both the oldest and the youngest institution of higher education in Alabama's state educational system." It was founded in 1822; and for more than a century, it was operated as a private college by the Methodist Church. In 1974, in the face of an insurmountable financial crisis, the United Methodist Church offered the college to the State of Alabama; and in 1975, over the objection of ACHE, the school was accepted by the State Board of Education subject to the appropriation of operating funds by the legislature.

The legislature authorized Athens State to function as a senior college. It accepts transfers from the junior college community and technical colleges of the State, as well as transfers from the traditional four-year colleges and universities.

In 1981, the legislature placed Athens State and John C. Calhoun State Community College under a single admin-

istration. In the words of the State Superintendent of Education, the two schools are "being operated under one administration now as more or less a single college." The Court concludes that Calhoun Community and Athens College operate in tandem as a four-year college.

The main campus of Calhoun Community College is located in Decatur, Morgan County, approximately ten miles from the main campus of Athens State in Limestone County. Athens State's main campus is roughly twenty miles from the main campus of A & M; and Calhoun Community College's main campus is even closer to A & M.

Calhoun State Junior College was established post-*Brown* and its enrollment was limited to white students until the *Lee v. Macon* decision in 1967.

In 1965, Troy State University ("TSU") set up a branch in Montgomery. Under the policy of the State Board of Education, TSU's Montgomery ("TSUM") branch did not accept black students until forced to do so in *Lee v. Macon*. By 1976, 27% of TSUM's 304 fulltime undergraduate students were blacks.

TSUM offers programs at the graduate and undergraduate level. It operates only evening and weekend classes. TSU operates a nursing program in Montgomery.

Since 1983, TSUM has been accredited independently of TSU.

The programs offered by TSUM largely and unnecessarily duplicate similar courses at ASU. In 1975, ACHE observed and recommended

> The situation in Montgomery is further complicated by the presence of an expanding program offered by Troy State University. . . . In Montgomery, except for the nursing program at St. Margaret's Hospital and the law enforcement program at the Montgomery Police Academy, Troy State University should restrict

> its offerings to Maxwell Air Force Base. Its programs should primarily serve the needs of the military. Non-military related civilian enrollment should be strictly limited. At neither the graduate nor undergraduate level should Troy State attempt to become a third general purpose institution in Montgomery serving the general civilian population.

TSU's Board of Trustees has obviously ignored the recommendation.

In recognition of the need for a coordinated system of higher education, the Alabama legislature in 1969 created the Alabama Commission on Higher Education ("ACHE"). ACHE consists of twelve members, ten of whom are appointed by the governor (one from each congressional district, the others at large); and one each by the lieutenant governor and the speaker of the house of representatives. Members serve for nine-year terms, and their appointments must be confirmed by the state senate. ACHE serves in an advisory capacity to the legislature and the governor ". . . in respect to all matters pertaining to state funds for the operation and allocation of funds for capital improvements of state supported institutions of higher education." § 16-5-2 *Code of Alabama of 1975*, as amended.

ACHE is broadly charged with the duty of continuously analyzing and evaluating the present and future needs of higher education in Alabama, establishing statewide long-range planning, coordinating programs in instruction, research and public service, and submitting to the governor and the legislature annually ". . . a single unified budget report containing budget recommendations for separate appropriations to each of the institutions" in the state system of higher education. § 16-5-5,6,8,9 *Code of Alabama of 1975*, as amended. The commission also has the duty of "classifying and prescribing the role and scope for each public institution of higher education in Alabama," and of recommending changes in the role and scope of respective

institutions "as it deems necessary and which may be agreed to by the governing board" of the affected institution. § 16-5-10(6) *Code of Alabama of 1975*, as amended.

ACHE approval is required for the establishment of new programs or units of instruction. However, any institution may bypass ACHE and go directly to the legislature for approval of the new program or unit. While the University of Alabama and Auburn, because of their status as entities created by the 1901 Constitution,[23] are not required to obtain such approval, they often seek it. The commission has established procedures and criteria for the review of new programs and units, at both the undergraduate and graduate levels. There is a peer review of proposed new undergraduate programs or units. At the graduate level, proposed new programs are referred to an Advisory Council, consisting of the graduate deans of each of the institutions.

The affirmative vote of a majority of the Council is necessary for a recommendation that the program/unit be approved by the ACHE board.

The commission uses a formula process in recommending to the governor and the legislature a budget for each of the institutions. The funding formula, first used in the early seventies, has several components. Faculty salaries, teaching load, class size, differences in the costs of instruction of various subjects, and differences in the level of instruction, are all considered in the formula. The formula is based on the historical cost data of the various institutions; and to the extent that funding inequities have existed in the past, they are necessarily perpetuated in the formula approach.

In its 1975 "Planning Document Number One", ACHE established three categories of public institutions of higher

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[23] *Opinion of the Justices*, 417 So.2d 946 (Ala.1982).

learning: (1) doctoral universities, with three subclasses, (2) master's-level state universities, and (3) two-year institutions. Under this classification scheme, the University of Alabama, Auburn, UAB, UAH, and the University of South Alabama are included in Category I. ASU, A & M, and the other state universities are placed in Category II; and the community colleges comprise Category III.

Under the funding formula, Category I institutions are entitled to enhanced funding ratios because of their status.

III

The Land Grant Issue

Prior to the Civil War, the sale of public land was the chief instrument for national development policies. To encourage the development of higher education in the states, for example, Congress set aside public lands in various states for the establishment of "seminaries of learning." The University of Alabama was established pursuant to such congressional action. The orientation and curricular of the original state universities tended to be classical.

In 1862, Congress enacted the Morrill Wade Act, which was designed to foster the development, in each state, of a

> college or colleges where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life.

Towards that end, each state was entitled to 30,000 acres of land or land scrip for each of its senators and representatives in Congress in 1860. Alabama was therefore

entitled to 240,000 acres for a land-grant college or colleges. Each state was required to provide the buildings for the college(s).

The Civil War delayed the application of the Morrill-Wade Act to the southern states. During Reconstruction, Mississippi accepted the Morrill Act, and designated two land-grant colleges: the University of Mississippi for whites, and Alcorn University for blacks. Morrill Act funds were divided on a 40:60 basis between the two schools. In Kentucky, South Carolina and Virginia, the First Morrill funds were allocated between black and white land grant schools.

In Alabama, although blacks requested that a land grant college be set up for them, the Legislature designated Auburn as the only state land grant school. It was not open to blacks. Therefore, blacks did not receive any of the benefits of the First Morrill Act. The experience of Alabama blacks was not uncommon in the South; and between 1872 and 1890 northern Congressmen made repeated efforts to require the Southern states to equitably divide the land grant funds. They were unsuccessful in 1872, 1875, 1884, 1886, and 1880. Finally, in 1890, Senator Morrill was successful in persuading Congress to pass the Morrill-McComas Act, the Second Morrill Act. This act provided continuing federal appropriations; and more importantly it contained an anti-discrimination provision:

> . . . no money shall be paid out under this act to any State . . . for the support of college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held in compliance with the provisions of this act if the funds received in such State . . . be equitably divided. . . .

The Act further provided that the ". . . institution for colored students shall be entitled to the benefits of this act and subject to its provisions, as much as it would have

been if it had been included under the act of 1862. . . ." The Second Morrill Act is unquestionably a "supplement" to the First Morrill Act.

Meanwhile, in recognition of the need to apply science to the problems of agricultural production, Congress enacted the Hatch Act in 1887. This act made annual appropriations to the "college or colleges" established under the First Morrill Act, "or any of the supplements to the Act, in each state for the purpose of setting up agricultural experiment stations." The Hatch Act recites that ". . . in any State . . . in which two such colleges have been or may be so established the appropriation . . . made to such States . . . shall be equally divided between such colleges unless the legislature of such State . . . shall otherwise direct." When the Hatch Act was passed, the southern states (except the three mentioned) had designated only white institutions as land grant colleges. The Act clearly contemplated that black land grant colleges would be thereafter designated under the Morrill Act, and it gave the legislatures the authority to equally divide the agricultural experimentation funds to include the black institutions.

Auburn was promptly designated as the sole recipient of Hatch Act funds; the black land grant college in this state has never been designated to receive, and for that reason has not received, any such funds. To be sure, the Alabama legislature did appropriate state funds for "colored agricultural experiment stations" in 1896 at Tuskegee Institute and the Alabama State Normal School for Negroes in Montgomery; but neither of these was ever designated to receive Hatch Act funds. Their state appropriations for agricultural research were short-lived. It was only the imminency of this lawsuit that prompted the legislature in 1981, for the very first time, to appropriate a rather meager amount for agricultural research *and* extension at Alabama A & M.

By the early 1960s, Auburn was receiving approximately $1,000,000 a year under the Hatch Act alone. By the early eighties, its Hatch Act funds had increased to over $3,000,000.

In 1883, the legislature established the Alabama Agriculture Experiment Station ("AAES") and placed it at Auburn. All of its scientists and administrators are located on the main campus at Auburn. The vast majority of the academic faculty of Auburn's School of Agriculture and Biological Sciences have joint appointments with the AAES. The head of each academic department in the School of Agriculture is also the head of the corresponding research unit within the AAES. There are 773 employees of AAES.

The work of AAES is divided into three geographical districts within the state. There are 21 substations of AAES; 14 of which are manned. The 1984 state appropriation to AAES was $8,700,000. Another $3,800,000 in federal funds was obtained under the Smith-Lever Act and similar federal legislation.

The Food and Agriculture Act of 1977 (P.L. 95-113), requires the director of the State Agricultural Experiment Station in each state where land grant institutions are located, together with the chief administrative officers for agricultural research at the other eligible institutions, to jointly develop, by mutual agreement, a comprehensive program of agricultural research for the state. AAES, A & M and Tuskegee Institute have jointly submitted the required comprehensive program to the Department of Agriculture since 1978; and they have been approved. AUX 6893, 6733, 6735. In these programs, AAES, A & M, and Tuskegee state that they, individually and as a group, "concur with and find no difficulty in the development and administration of a single comprehensive agricultural research program. . . ." There is therefore no basis for Au-

burn's assertion that statewide agricultural research cannot be shared between Auburn and A & M.

Auburn is also the site of the Alabama Engineering Experiment Station.

AAES owns 15,319 acres of land outside the Auburn campus. It has three experiment fields and forest units in four counties. The book value of these off-campus holdings is $3,406,418.

Auburn's state and federally supported agricultural research over the years have had a significant impact on the economic life of Alabama. As Auburn notes, "[t]hese research activities are also essential to the quality of the University's graduate programs." GX 96.

Lacking this state and federal support for agricultural research, A & M has not achieved a land grant status comparable to Auburn.

In 1914, Congress enacted the Smith-Lever Act, 7 U.S.C. § 341 *et seq.* The statute recites, in pertinent part

> That in order to aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture and home economics, and to encourage the application of the same, there may be inauguranted in connection with the college or colleges in each State now receiving, or which may hereafter receive, the benefits of the [First Morrill Act] and of the [Second Morrill Act] agricultural extension work which shall be carried on in cooperation with the United States Department of Agriculture: *Provided*, that in any State in which two or more such colleges have been or hereafter may be established the appropriations hereinafter made to such college or colleges as the legislature of such State may direct. . . .

Federal funds received under the Smith-Lever Act must be matched by state or local funds.

Governor Emmet O'Neal was notified by the Department of Agriculture, on May 14, 1914, of the need to designate ". . . the agricultural college or colleges to which the funds in this act are to go." Ten days later, the Governor met with the president of Auburn Polytechnic Institute and thereafter sent a letter to the Secretary of the Treasury designating Auburn as the sole Alabama institution to receive funds under the Smith-Lever Act. Apparently this designation was not widely known; and on June 16, President Buchanan of A & M formally applied to the Governor for a portion of the Smith-Lever funds, and simultaneously submitted a rather detailed plan and budget for the use of the funds by A & M. Upon receipt of the application, the Governor forwarded it to President Thach of Auburn for his ". . . opinion as to Buchanan's suggestions, and suggest[ed] form of reply."

By the time the Governor's correspondence reached President Thach, President Buchanan had already visited Thach twice concerning the matter. President Thach responded to the Governor on June 26:

> According to the Act and your certification, the work has already been established and organized in connection with the land grant college for the whites. . . . The funds available this year is only $10,000, and this has been appropriated by the Board of Trustees in an enlargement of the work already undertaken throughout the State. The plan includes assistance to the negro race, which will be administered by the staff of officers and specialists already employed. There is, on the part of the present organization, the keenest appreciation of the needs of the negro race, and as the funds develop every effort will be made to render all assistance possible.

There is no credible evidence of any plan of assistance for blacks by Auburn at the time.[24]

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[24] The Auburn plan, for example, included "work throughout the

Along with various other institutes and schools, Tuskegee Normal and Industrial Institute also applied for a portion of the Smith Lever funds.[25] The Governor indicated to Dr. Washington of Tuskegee that at the time Auburn was designated, "[i]t was understood that a proper proportion of this fund should be used for the benefit of the colored farmers of the State." The Governor was ". . . of the opinion that your institute should receive a proper proportion of the fund and [I] have so written Dr. Thach, requesting him to take the matter up with you through correspondence." The Governor stated his unequivocal intention to ". . . approve any plan to which they [i.e., Dr. Thach and Dr. Washington] may agree in reference to a proper division of this fund."

Dr. Thach, with considerable indignation, wrote the Governor on July 28 and told him that as far as he (Thach) was concerned, the matter was "res adjudicata"; that Auburn had been duly designated as the recipient of the funds, that its designation was consistent with the uniform practice of the Southern states to designate the white land grant school as the sole recipient of Smith-Lever funds, and that Auburn had already approved extension plans and let contracts for the extension projects.

He concluded by offering to confer with the Governor "in person concerning the matter." The conference was unnecessary; from that point on, the Governor took the position that he had no authority in the matter.

By resolution of January 15, 1915, the Legislature ratified the action of Governor O'Neal's designation of Auburn for Smith-Lever funds.

State" in various agricultural projects, and "cooperation with the Girls' Tech. Inst., Montevallo." Letter of July 28, 1914. Of course, the Girls' Technical Institute was all-white.

[25] The Smith-Lever Act by its terms restricted extension funds to land grant colleges receiving funds under the First and Second Morrill Acts.

The Alabama Cooperative Extension Service ("ACES") was established at Auburn in 1914.

For purposes of service by ACES, the State has been divided into three geographical districts. There are joint appointments between ACES and the academic faculty at Auburn.

Federal law requires that a single, comprehensive program of extension be developed for each state. P.L. 95-113 (1977). A & M, Tuskegee Institute and Auburn have since entered into such a plan. The plan requires the institutions, among other things

> "D. To take the necessary steps to effect a jont Extension program at the county, district, and state levels.
>
> G. To develop organizational structures at the county, district and state levels that promote unified programs and discourage fragmentary of duplicative programs.

AUX 6699, p. 3.

The three integral components of any viable land grant university are instruction, research, and extension. The former director of the Alabama Cooperative Extension Service correctly analogized:

> It's like love and marriage, you can't have one without the other. . . . You can't have a land grant concept unless you have the three pieces, teaching, research and extension.

Auburn's facilities for agricultural instruction, research, and extension are vastly superior to those of A & M. Suffice it to say that the respective facilities are incomparable. These differences are principally the product of racial discrimination.

Until 1982, the legislature appropriated no money whatever to A & M for agricultural research and extension.

The total sum appropriated by the legislature to A & M for these purposes in 1982-83 was equal to the sum appropriated to Auburn for such purposes in 1947. In comparison to the $300,000 appropriated to A & M in 1982-83, the legislature appropriated over $19,000,000 to Auburn for extension, research, and services.

Completely aside from its discriminatory allocation of **all** federal Hatch Act and Smith-Lever funds to Auburn and the establishment of the AAES and ACES there, the state had a duty to appropriate sufficient *state funds* to A & M so that it could engage in substantial and meaningful agricultural research and extension work. The evidence compels a conclusion that the State of Alabama never intended A & M to function as a "separate but equal" land grant college; its purpose as a land grant school was merely to insure that Auburn would continue to receive the federal funds which enabled it to become the preeminent white land grant institution in Alabama.

IV

Vestiges of the Dual System of Higher Education

Having found that the State of Alabama operated a dual system of higher education at least until 1967,[26] the Court now turns to the question of whether the dual system has since been disestablished. Considerations of the racial identifiability of the students, faculty, staff, and governing boards are probative. Likewise, the factors of program duplications between proximate institutions, degree offerings, facilities, and funding are important to a determination of whether the state system of higher education has achieved unitary status.

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[26] The Court is mindful that some of the defendant institutions admitted a few blacks pursuant to court orders prior to 1967. But the admission of one or two blacks does not signal the end of segregation.

The University of Alabama System

The board of trustees of the University of Alabama is a largely self-perpetuating 12-member board, except for the two ex-officio members. However, each vacancy filled by the board is subject to confirmation by the state senate; and if the senate rejects a person elected to the board, then the senate fills the vacancy. Until 1982, no black had ever been elected to the board of trustees. In that year, two were elected and they are presently serving.

In June, 1969, the board of trustees established the University of Alabama System ("UAS") with three independent and autonomous campuses located respectively at Tuscaloosa ("UAT"), Birmingham, ("UAB") and Huntsville ("UAH"). Each campus has a president, appointed by the board of trustees. The presidents of the three campuses report to the Board through the Chancellor of UAS, who is the chief administrative officer of the system.

At the time this lawsuit was initiated, 12.6% of the fulltime undergraduate students at UAT were blacks; only 4% of its graduate and professional students were blacks. For entering freshmen, admissions decisions are based in part on ACT scores. To the extent that the use of ACT scores by UAT adversely impacts on black students, the intensive recruitment of black undergraduate students compensates for its use. For example, there are now over 300 black undergraduate students enrolled in the College of Engineering, due in large part to the commendable efforts of the university to generate an interest among black high school students in engineering and in attending UAT. UAT professors have demonstrated a continuing concern for the success of such students after their matriculation.

Black students are comfortable in the UAT setting; and their involvement in student activities is accepted and encouraged. Black students have served as president of the

Student Government Association, Homecoming Queen, and in a number of other leadership roles on campus.

In 1982, 22 out of the 826 fulltime faculty at UAT were blacks; only 3 out of the 132 parttime faculty members were blacks. The Dean of the School of Social Work is black; and blacks have occupied two endowed chairs at the University. There is an adjunct faculty exchange agreement between UAT and the predominately black Stillman College, also located in Tuscaloosa. Of the 28 new faculty members hired by the College of Arts and Sciences last year, two are black, another two are asian and one is hispanic. UAT has unsuccessfully recruited and extended offers of employment to other blacks. These efforts and offers were undertaken in good faith.

The programs and offerings of UAT do not unnecessarily duplicate programs and courses of A & M or ASU.

In 1983, blacks constituted 24% of the fulltime undergraduate enrollment at UAB; they accounted for 18% of the total enrollment there. There is no credible evidence of any impediments to the admission of blacks to UAB or to the participation by black students in the activities and affairs of the campus.

UAB's faculty statistics are somewhat bleak. Only 38 (2%) of some 1,325 persons on the fulltime faculty are black; and two of the 361 professors are black. However, more than half of the black faculty have attained tenured status; and another third is on the tenure track.

Blacks account for 11% of the professional nonfaculty at UAB; and for 35% of the other nonscience/maintenance jobs.[27] Blacks are well represented in service/maintenance job classification at UAB, accounting for 8.5 out of every 10 such employees.

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[27] These include administrative, management, secretarial-clerical, technical-paraprofessional, and skilled craft jobs.

The programs and courses of UAB do not unnecessarily duplicate those offered at the main campuses of A & M and ASU. To the extent that either or both of the latter schools continues to offer programs in Birmingham, they unnecessarily duplicate the programs of UAB.

Admission to the freshman class as a regular student at UAH is based on a high school grade point average of "C" and a minimum American College Testing Examination ("ACT") score of 16. Students who do not meet these requirements may be admitted under a special admissions programs.

In 1976, the first year for which such figures are disclosed in the record, 5% of the fulltime undergraduate students at UAH were blacks. Six years later, the percentage remained the same. In the 1984-85 freshman class at UAH, 7.2% of the students are blacks. UAH generally limits its recruiting to its primary service area: Madison, Marshall, Morgan, Jackson and Limestone Counties—in which blacks account for 12% of the total population.

In 1982, there were two blacks on the 194 member fulltime faculty of UAH; and an equal number on the 132 member parttime faculty.

The graduate degree program in administrative science at UAH does not unnecessarily duplicate A & M's master of business administration program.

The undergraduate and graduate teacher education and certification programs offered at UAH unnecessarily duplicate similar and older programs offered at A & M. Since the institution of certain certification and graduate programs in education by UAH, white enrollment in similar courses offered at A & M has drastically declined.

Beginning in 1969, A & M offered an undergraduate degree program in computer science technology. In 1975, it obtained ACHE approval to offer a master of science degree in computer science technology. A year later, UAH

obtained ACHE approval to offer a master of science in computer science. In 1980, UAH sought ACHE approval to offer a bachelor of science degree in computer science. The staff of ACHE recommended disapproval of the program, on the ground that its implementation ". . . would constitute an unwarranted duplication of the existing bachelor of science program in computer science technology offered by Alabama A & M University." UAH also requested approval of a doctoral program in computer science; and again, the staff recommended disapproval of the proposed program, "without prejudice pending the submission of a statewide desegregation plan", due to "the impact of the program in the Huntsville area." SX 18. The ACHE board of directors rejected these recommendations, and subsequently approved both programs. The existence of these unnecessarily duplicative courses at UAH had the effect of reducing white enrollment in A & M's master's program in computer science from 90% in the mid-seventies to 19% at the present time.

As noted earlier, since 1967 UAH has offered a master's degree in physics. Contemporaneously in 1979, the chairman of the newly-created physics department at A & M and other A & M officials met with the president of UAH, the UAH physics department chairman, and other UAH officials and suggested that the two schools initiate a joint graduate program in physics. The UAH Officials rejected the proposal. Thereafter, in September 1979, A & M submitted to ACHE, for its approval, a proposed master of science degree program in applied physics. The proposed program would consist of two options: optics and materials science. At the urging of UAH, and its staff, ACHE initially disapproved the program in July, 1980. The staff further recommended that A & M and UAH consider a joint master's program in applied physics. Several meetings were held; and in the meanwhile ACHE hired an outside consultant, Dr. Stanley Ballard of the University of Florida, to review A & M's proposed program.

Dr. Ballard evaluated the proposed program, and warmly endorsed the A & M proposed program.[28] In his summary, he concluded that "[t]he speciality courses in applied optics and materials science which have been planned by the A & M faculty members show understanding and originality." AMX 122. In further support of its proposed program, A & M obtained an endorsement from the Director of the Spectroscopy Laboratory at the Massachusetts Institute of Technology, who wrote:

> The proposed optics program does not appear to significantly overlap the Master's program in the 1980-81 catalog of the University of Alabama at Huntsville. The three or four background physics courses would be similar, but the extensive selection of specialty courses is not offered at UAH. As far as I can tell, a student could not obtain a specialty degree in optics based on the curriculum outlined in the UAH catalog.

Professor William B. White of the Pennsylvania State University's Materials Research Laboratory likewise strongly supported the A & M proposed program, and he also concluded that the proposed program of A & M and that offered by UAH "are by no means identical."

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[28] His report indicates, *inter alia*:

> The proposal is that an M.S. curriculum in applied physics be developed and initiated at Alabama A & M University. In my opinion, this would be a worthwhile project. Applied physics . . . is a rapidly growing field. Modern advances in optics, electronics, materials (surely including semiconductors) and sophisticated computer backup constitute a major force in modern-day research and development in industrial and government laboratories. An inclusive term that is widely used is "electro-optics. * * * The fields that A & M selected for first attention are excellent: modern optics (of course including lasers), and materials science (including applications to solar energy).
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> * * *
>
> The outlines that were sent me showed a rather complete offering in optics, with some 12 courses listed.

With these endorsements, the ACHE staff recommended approval of the A & M master's program in applied physics; and it was approved by the ACHE board on August 14, 1981.

ACHE has never approved either a program in applied physics or optics for UAH.

Since the approval of the A & M program in applied physics, the legislature has established a line-item (i.e., annual) appropriation of $600,000 to UAH for the operation of an optics center. It was with this annual state appropriation that UAH was able to set up a Center for Applied Optics, and to entice Dr. John Caulfield to become its director earlier this year. Dr. Caulfield has brought with him to UAH a $9,000,000 "Star Wars" grant from the Department of Defense.

Auburn University

The Board of Trustees of Auburn University consists of the governor, the state superintendent of education, two members from the congressional district in which the institution is located, and one member from each other congressional district in the state. At the time this lawsuit was filed, no black person had ever served on the board; its first black member was appointed earlier this year. Auburn University and its predecessor institutions have always been operated by a board of trustees.

In 1980-81, blacks constituted 2.09% of the undergraduate enrollment, and 5.4% of the graduate students. For the 1983-84 school year, blacks constituted 2.4% of the undergraduates and 2.1% of the fulltime graduate enrollment. The Auburn main campus has the largest student body of any college or university in the state.

Auburn hired its first fulltime black faculty member in 1970. In the next thirteen years, it hired six more, so that by 1983-84, the seven blacks accounted for .6% of the

total faculty of 1,033. Generally, Auburn does not actively recruit blacks for faculty positions. The reputation of Auburn University in racial matters leaves it at a distinct disadvantage, on a competitive basis, to attract qualified black faculty.

Except for athletes, Auburn admits as regular freshmen only those applicants whose ACT scores are at least 18 and who have an overall grade point average ("GPA") of "C".[29]

The 18 ACT requirement, standing alone, effectively renders most black high school students ineligible (other than athletes), since the average ACT score of black students is only 12.7. Auburn is aware of the effect of this requirement.

The ACT requirement was first adopted by Auburn in 1962. A minimum 16 ACT was the requirement until 1968, when the minimum was raised by two points.

In 1977, Auburn's Director of Planning and Analysis completed a study entitled, "The Value of ACT and SAT Test Scores as Predictors Of First Year Performance At Auburn University." He concluded:

> Both the ACT and the SAT exhibit an acceptable level of predictive validity. Used alone, either is an equally good predictor of college performance. Of equal or greater importance, though, is past performance, as measured by high school grades. Obviously, a wide variety of high school grading practices exist, but the student who receives good grades in high school typically scores high in college. This predictive relationship is at least as strong as (and generally stronger than) those obtained when the ACT and SAT are used as predictors.

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[29] The Admissions Officer testified that if an applicant has an overall GPA of "B", he or she may be admitted with a minimum 16 ACT score.

Auburn University Exhibit ("AUX") 7468, p. 7.

The study also noted that although ". . . Auburn freshmen score very high nationally in the college aptitude tests, [they] rank rather low in first year college grade point average." *Id.*, p. 6.

Athletes seeking admission to Auburn are not subjected to the 18 ACT requirement. In fact, there is no minimum ACT or SAT score for them; and within the past five years, Auburn has admitted athletes with scores as low as 6. AMX 149.

Black student participation in campus life and activities at Auburn is at a lower level than that of any of the other state-supported institutions of higher learning.

In *Strain v. Philpott*, 331 F.Supp. 836 (M.D.Ala.1971), Auburn was found to have discriminated against black employees of ACES:

> The racial discrimination in this case has so permeated the employment practices and services distribution of the defendants that this Court finds it necessary to enter a detailed and specific decree which will not only prohibit discrimination but will also prescribe procedures designed to prevent discrimination in the future and to correct the effects of past discrimination.

Id. at 844.

The decree was entered in 1971. Twelve years later, the Court wrote: "The underlying problem in this case remains the absence of a more substantial number of blacks in managerial positions at the Alabama Cooperative Extension Service."

Auburn has a 1,871 acre campus, with 71 major buildings.

The evidence tends to support the widespread perception of blacks in Alabama that, except for the presence of black

athletes and the changes mandated by federal laws and regulations, Auburn's racial attitudes have changed little since the fifties.

The relevant statistics at AUM stand in stark contrast to those of the main campus of Auburn. In 1972, 3% of the undergraduate enrollment at AUM was black. By 1982, 588 (16%) of the 3,570 undergraduates enrolled there were blacks. Only 4% (15 out of 375) of its graduate students in 1972 were blacks; ten years later, the number had increased to 29 (10%) blacks out of a total graduate enrollment of 268.

The regular admissions requirements at AUM are not as high as those of the main campus. A grade point average of "C" and a minimum ACT of 16 are required for regular admissions. There are special admissions programs for students not meeting those requirements; and roughly 10% of the students are admitted under these special programs. The institution vigorously recruits black students. The student activities coordinator is black. Black students are actively involved in the campus life at AUM, one having served as president and three others as vice presidents of the student government association.

AUM hired its first fulltime black faculty members in 1971, when two were hired. By 1983, ten (5%) of the 179 fulltime faculty members were blacks, and 9% (12 out of 128) of the parttime faculty was black. In recent years, AUM has recruited blacks for faculty positions; indeed, it has attempted to recruit at ASU and Alabama A & M. Today, 13 blacks are among the 189 member fulltime faculty. A black has served as a department head; and five blacks hold tenured positions.

There is substantial needless duplication of the education and business programs offered by AUM and ASU. The presence of duplicated programs at AUM—a much newer and more attractive facility than ASU—has a negative impact on white enrollment at ASU.

Alabama State University

As noted earlier, Alabama State University ("ASU") was removed from the control of the State Board of Education and given a separate board of trustees in 1975.

The board of trustees of ASU consists of the governor, a member from each of the state's congressional districts, and two members appointed from the state at large. There is only one white on the board of trustees (other than the governor); and the governor has generally appointed blacks (14 out of the 19 appointments) to the board.

As of 1982-83, there were 3,369 fulltime undergraduates at ASU; only 4 of whom were whites. In the 1972-73 school term, there were 50 whites among the 2,552 fulltime undergraduates. In an effort to recruit white students, ASU has offered a full scholarship to the valedictorian and salutorian of each Alabama high school. The program has been in effect since 1969; but it has been frustrated by white high school officials who respond by referring their top black students to ASU. There is no showing of involvement of white students in the campus life at ASU. There are only 3 whites in ASU's graduate programs.

In 1982-83, whites made up 19% (37 out of 193) of the fulltime faculty at ASU. In 1979-80, whites constituted 21% of the fulltime faculty. Nearly half (18 out of 41) of the parttime faculty is white.

In *Craig v. Alabama State University*, 451 F.Supp. 1207 (M.D.Ala.1978), ASU was found to have engaged in a pattern of discrimination against whites in hiring and promotions.[30]

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[30] Most of the findings in that case relate to actions taken, or not taken, by ASU during the time that it was operated by the state board of education. There is no evidence of discrimination against whites by ASU at anytime since it was given a separate board of trustees.

ASU still operates graduate programs of education in Birmingham, Mobile, Selma, and Uniontown. The programs in Birmingham and Mobile unnecessarily duplicate programs offered by UAB and USA, respectively.

Alabama A & M University

Since 1975, A & M has operated under an independent board of trustees. The board's membership includes the governor, two members from the congressional district in which A & M is located, one member from each other congressional district in the State, and three members from the state-at-large. Two of the present members of the board are whites. Since the board was created in 1975, 12 blacks and 7 whites have been appointed to it.

During the 1982-83 school year, there were only 41 whites among the 2,977 fulltime undergraduates at A & M. There has been a gradual decrease in the white enrollment at the school over the last few years. In 1976-77, for example, whites accounted for 8% (292 out of a total of 3,375) of the undergraduate fulltime enrollment. In 1982-83, only 10% of the graduate enrollment was white; whereas only four years earlier (1978-79) 39% of the fulltime graduate enrollment was white. This decrease in white enrollment at A & M is directly attributable to the duplicative course and program offerings at UAH and Athens State-Calhoun Community Colleges.

There is substantial desegregation of A & M's faculty. As of 1983-84, 25% of the fulltime faculty was white. In the preceding four years, an average of 29% of the fulltime faculty was white.

Despite the lack of adequate agricultural facilities, A & M has completed beneficial agricultural research on triticale, remote sensing, and soybean breeding. Its significant research activities in remote sensing have continued despite attempts by state agencies to divert this research to Auburn.

A materials science research experiment of one of A & M's professors was selected for inclusion on a Space Lab 3 mission. His laboratory at A & M is an inadequate facility adjacent to the boiler room in the basement at A & M. The professor, Dr. Lal, has been commended by the governor and the legislature; but he has not received any state funding for his research activities.

A & M owns 875 acres of land, including its campus.

The extent of renovations over the last 30 years at A & M adversely affects its ability to attract white students. Vehicular and pedestrian roadways and sidewalks are in serious need of repair; buildings are boarded up. The overhead power lines, bare ground, surface erosion and parking lots interspersed among the buildings detract from A & M's overall appearance. Substantial renovations and new construction are necessary to enhance A & M's attractiveness to white students.

A & M's attempts to enhance its program offerings are discussed at pp. 67-70, *supra*.

In 1981, A & M applied for approval of a doctoral program in nutrition science. The only reason for the disapproval of the program was that

> . . . the proposed program represented a request for a change in the role and scope of A & M University as outlined in Planning Document Number One. It was the Commissioner's opinion, any revision in role and scope for institutions should be addressed through statewide planning activities.

University of South Alabama

The USA board of trustees consists of the governor, the state superintendent of education, three members from Mobile County, three members from the state at large, one member from each of the nine state senatorial districts

in the southern third of the state. The first and only black person was appointed to the board in 1984.

By 1971, however, blacks constituted 6% of the total student body. As of 1983, 10% of the total enrollment was black. 65% of USA's 1983-84 undergraduate enrollment of 2,317 students came from Mobile County; and blacks constitute 31% of the population of the county.

An applicant for regular undergraduate admission must have an ACT score of at least 16, or a combined SAT score of at least 800. Students who do not meet this requirement may be admitted under a "limited enrollment program." Students may transfer to USA after completion of junior college, if they have maintained at least a "C" average. This transfer policy is one means by which greater numbers of black students may gain admission to USA, since the predominately black Bishop State Junior College is now operating in the Mobile area.

In addition to its College of Arts and Sciences offering 29 baccalaureate degree programs and seven master's programs, USA now has colleges of business and management, education, engineering, allied health, nursing and medicine.

USA hired its first black faculty member in 1968; in that year, it has over 120 white faculty members. As of 1983, there were 15 fulltime black faculty members and 500 whites. Five (11%) of the 44 parttime faculty members were blacks. At the undergraduate level, there was only one black professor, one black associate professor, 4 black assistant professors, and 3 black instructors.

USA has entered into a consent decree with the United States which provides for, among other things, the development and enhancement of an increased number of black faculty.

University of Montevallo

The board of trustees of the University of Montevallo consists of the governor, the state superintendent of education (ex officio), a member from each congressional district, and two members from the state at large. The sole black member of the board was appointed in 1983.

Today, blacks constitute 9.1% of the University of Montevallo's student body; and they vigorously participate in the life of the university. There are presently nine blacks on the faculty of the university; over a dozen have been employed there over the past eight years.

The University of Montevallo has entered into a consent decree with the United States which provides for, among other things, the development and enhancement of an increased number of black faculty.

The board of trustees of the University of North Alabama consists of the governor (who is ex-officio president), the state superintendent of education, six members from the Seventh and Eighth Congresional Districts of Alabama and three members from the state at large. The trustees are appointed by the governor for twelve-year terms, and approved by the Senate. Since 1975, there has been a single black serving on the board of trustees.

Today, blacks constitute 8% of the UNA's total student population of 4,825. The school utilizes an "open door" admissions policy; and there is no evidence that the admissions policies of UNA actively discriminate against blacks or that blacks are adversely impacted by such policies. Black students are actively involved in the campus life.

Presently, there are 7 fulltime blacks on UNA's total faculty of 192. The first fulltime black faculty members were hired in 1969. There are no black administrators or professional staff members at UNA presently; although

there have been as many as two such persons between the years 1976-1981.

The programs and courses of UNA do not unnecessarily duplicate those offered by A & M, due to the considerable distance between the schools.

Jacksonville State and Livingston Universities

The Jacksonville Normal School and Livingston Female Academy and Normal School became four-year teachers colleges for whites in 1929.

The board of trustees of Jacksonville State University consists of the governor, the state superintendent of education, two members from the congressional district in which the university is located, and one member from each of the other congressional districts in the state. The board of trustees of Livingston State University is similarly constituted, except that it has four additional members, appointed from the state-at-large. The first black to serve on the Livingston board was appointed in 1981; a similar appointment to Jacksonville's board was made in 1983.

As of 1982-83, Livingston had 1,458 students; 567 (38%) of whom are black. On its 57 member faculty, there are presently no blacks. Six black persons have been hired as faculty members at Livingston since 1974, but they have all left the school for reasons unrelated to race. Other blacks have been offered positions at Livingston, but they have declined employment there, again for reasons unrelated to race.

As of 1982-83 blacks accounted for 16% of the total student population at Jacksonville. Nine (3%) of the 267 faculty members there were blacks.

Both Livingston and Jacksonville have entered into consent decrees with the United States, under whose terms

the schools are obligated to implement special programs to develop and enhance black faculty over the next five years.

The programs and courses of Livingston and Jacksonville do not unnecessarily duplicate the programs of Alabama State University and Alabama A & M University because of the distances involved.

Troy State University

The board of trustees of TSU consists of the governor, the state superintendent of education, two members from the congressional district in which the school is located, and one member from each of the other congressional districts in the state. No black has ever been appointed to TSU's board of directors.

Black enrollment at TSU's main campus has risen from 2% in 1972-74 to 19% in 1984-85. The admissions office actively and successfully recruits black students.

Unconditional undergraduate admission requires a minimum 16 ACT score and a "C" average. Conditional admission is available to applicants scoring less than 16 on the ACT but having at least a 2.3 ("C") grade point average in high school work. Without regard to ACT scores or grade point averages, TSU accepts transfers of junior college students who have maintained a "C" average for two quarters.

The programs and courses offered by TSU at its main campus and in Dothan, Alabama do not duplicate the program courses offered by Alabama State University.

The fulltime faculty of TSU's main campus consists of 5 blacks and 150 whites.

The programs and courses offered by TSUM largely and unnecessarily duplicate various programs and courses offered by ASU in Montgomery. At the undergraduate level,

there are at least 15 unnecessarily duplicated programs; and an equal or greater number of duplicative courses are offered by TSUM at the graduate level.

Between 60-72% of TSUM's enrollment is white. In 1982-83, TSUM had an average of 549 fulltime students and an average of 1,502 parttime students. Its fulltime faculty consisted of one black and 25 whites.

Athens State

Admission requirements of Athens State are simple: a degree from a regionally accredited two year institution; a diploma from a technical college or institute; or the completion of 96 quarter hours of college credit with a 2.0 grade point average on a 4.0 scale.

As of the winter quarter of 1985 Athens State had a student enrollment of 1,148; 473 of whom were enrolled on a fulltime basis. Only 5% of its students live on campus. 1,045 of its students are white; and 78 (7%) are black. Four of its 43 faculty members are blacks.

Nearly two-thirds (63%) of Athens' current students are majoring in business administration (43%) or education (20%). State Board of Education Exhibit ("SBX") 256.

The college division of Calhoun Community College had 4,126 white and 422 black (8%) students in the 1984-85 school year. Over three-fourths (78%) of the college division's students reside in either Madison County (49%) or Morgan County. Sixteen percent of the population of those two counties is black. All of its students are commuters. The college division accounts for 61% of the students at Calhoun Community College. Its faculty consists of 120 members.

Black students at Athens State have been warmly received. They participate vigorously in the activities of the college. In 1980, a black student was elected president of

the Student Government Association; and black students are well represented in the activities and life of the college.

ACHE has consistently opposed the state operation of Athens State, on the ground that its courses and programs needlessly duplicate existing programs at A & M and UAH. Athens State's undergraduate programs in education, humanities and sciences, science and engineering, and business administration needlessly duplicate some 39 courses offered at A & M.

Calhoun Community College offers evening extension courses at West Lawn Middle School and Huntsville High School—both located in the City of Huntsville. As of the fall of 1983, sixteen of those courses needlessly duplicated evening courses offered by A & M. In the preceding year, 25 such courses were needless duplications. The vast majority of the 1,700 students enrolled in these Huntsville extension courses are white.

Athens State also offers courses in Huntsville, housed at Redstone Arsenal. In the 1984-85 school year, 198 students were enrolled in these courses. The overwhelming majority of these students are white.

The State Board of Education consists of the governor (as president and ex-officio member), and eight members elected from each of the congressional districts of the state. Prior to 1969, the members of the board were appointed by the governor from the respective congressional districts. The Board of Education has "general control and supervision of the public schools," except those institutions of higher learning having boards of trustees. § 16-3-11, *Code of Alabama of 1975*. The Board of Education adopts the "rules and regulations governing the training and certification of teachers."

There has not been a black member of the Board of Education since Reconstruction.

As mentioned earlier, the board promulgates the standards and criteria for teacher education and certification programs at all of the state's institutions of higher learning. Without prior board approval of a teacher education program, it is not eligible for either accreditation by the regional accrediting agencies or state funding. The unnecessarily duplicative education and certification programs at UAH, Athens State, AUM, and TSUM have all been approved by the State Board.

For a while during the last five years, the Board of Education administered the Emergency Secondary Scholarship Program established by the legislature and under which prospective teachers are given two-year full scholarships to the college of their choice. During the two years that the state board administered the program (1982-83 and 1983-84), not a single black applicant was among the 36 who were awarded scholarships.

Without exception, no black has ever been appointed to the presidency or other chief administrative office in a traditionally white university or college in the state; no white has served in a similar position at ASU or A & M since 1915. With one or two exceptions, the deans of the various schools and colleges within the traditionally white universities are whites; similarly, the black universities generally have black deans.

Alabama's choice of resource allocation for facilities for the period 1965 to 1983 significantly impaired the ability of Alabama State and A & M to attract white students. In both cases, a new campus has been constructed in the very city in which the black university is located. Aside from the new campus, the new institution is in each case operated by either the University of Alabama or Auburn University—indubitably the two most prestigious schools in the state. The relative quality and quantity of the facilities and equipment of ASU and A & M leave them at

a great disadvantage in competing against the proximate institutions for local white students.

Overall, both white students and traditionally white institutions are in a favorable financial position when compared with black students and traditionally black institutions in Alabama. For the period 1970-1983, ASU and A & M received less state and local appropriations per fulltime equivalent student than the University of Alabama at Tuscaloosa, Auburn, the University of Alabama at Huntsville, and Auburn University in Montgomery.

In 1982-83, the faculty at the University of Alabama and Auburn were paid, on the average, 28% more than faculty at Alabama State and A & M.

The funding formula and institutional classifications utilized by ACHE impede the disestablishment of the dual system of higher education, since they freeze in the effects of past funding and institutional discrimination against ASU and A & M.

The continued recognition of a special "constitutional status" for the University of Alabama and Auburn due to their inclusion in the 1901 Constitution, when ASU and A & M were omitted from the said Constitution for racial reasons,[31] is a vestige of the dual school system.

The student bodies of Auburn, AUM, ASU, A & M, UAH, and Athens College are still identifiable by race. The faculty of each institution in the system is identifiable by race, considering the total number of black and white faculty employed in the system and other evidence in the record.

Upon consideration of all of the evidence, the Court concludes that the State has not dismantled the dual system of higher education.

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[31] See *Hunter v. Underwood*, ___ U.S. ___, 105 St.Ct. 1916, 1920-21, 85 L.Ed.2d 222 (1985).

V

Special Defenses

The State of Alabama, Auburn University, and various other defendants have asserted that there is no system of higher education in Alabama; that this case is barred by the holding in *ASTA v. College Authority*, 289 F.Supp. 784 (M.D.Ala.1968); that ASU and A & M lack standing to assert cross-claims against the State of Alabama, and that the plaintiffs have failed to exhaust their administrative remedies under Title VI.

Most of the defendants deny that there is a system of higher education in Alabama. The Alabama legislature disagrees, for in the legislation creating ACHE it expressly refers to "the state *system* of public higher education . . ." § 16-5-10(2) *Code of Alabama of 1975*.

Members of the board of trustees of every defendant university are appointed by the governor of the state, with the sole exception of the University of Alabama. Every trustee, including those at the University of Alabama, must be confirmed by the Alabama state senate. The governor is the ex-officio chairman or president of the board of trustees of every state supported university—and as the evidence has shown clearly, that position is not merely ceremonial. With the exception of the traditionally black universities, the state superintendent of education is a member of the board of trustees of every state-supported university. Generally[32] on each board is at least one trustee appointed from each congressional district of the state.

Every university is required to submit a budget proposal to ACHE; and, in turn, ACHE is required to submit "a single, unified budget report" to the governor and the legislature.

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[32] Only the University of North Alabama and the University of South Alabama lack at least one trustee from each congressional district of the State.

Each new academic program or unit of instruction must be approved by ACHE; and it has the power to authorize and to regulate the off-campus offerings of the state universities.

As early as 1927, the State Board of Education was empowered to approve standards for teacher education programs at all of the state-supported colleges and universities, including those of the University of Alabama and Auburn. SBX 253-P.

Finally, in *ASTA*, the three-judge court judicially noticed that "Alabama has traditionally had a dual system of higher education"; and it found "as a fact that the dual system in higher education had not been fully dismantled." The defendants are estopped, therefore, from denying the existence of a system of higher education.

ASTA

In *ASTA* a three-judge court upheld the constitutionality of the legislation establishing AUM, both on its face and as applied.

Because ". . . no court dealing with desegregation of institutions in the higher education area has gone farther than ordering non-discriminatory admissions," and HEW ". . . has also largely limited its concern to admissions policies in administering Title VI of the 1964 Civil Rights Act," the Court stated that it, too, was "reluctant at this time to go much beyond preventing discriminatory admissions." 289 F.Supp. at 787 (emphasis added). The Court noted that since "[h]igher education is neither free nor compulsory", it is significantly different from elementary and secondary education. It concluded that

> as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to

> the extent that the system may be based upon racial considerations, is satisfied.

Id. at 789, 780.

The decision of the court was summarily affirmed by the United States Supreme Court. 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969).

As Judge Johnson, the author of the *ASTA* decision, has recently written:

> A summary affirmance of the Supreme Court has binding precedential effect. [Citing cases]. Yet because the court disposes of the case without explaining its reasons, the holding must be carefully limited. A summary affirmance by the Supreme Court represents approval by the Supreme Court of the judgment below but should not be taken as an endorsement of the reasoning of the lower court.

Hardwick v. Bowers, 760 F.2d 1202, 1207 (11th Cir.1985). Moreover,

> . . . a summary disposition binds lower courts only until the Supreme Court indicates otherwise. [cites omitted]. . . . Doctrinal developments need not take the form of an outright reversal of the earlier case. The Supreme Court may indicate its willingness to reverse or reconsider a prior opinion with such clarity that a lower court may properly refuse to follow what appears to be binding precedent.

Id. at 1208-09.

This Court concludes that in affirming *ASTA*, the Supreme Court merely agreed that the statute which authorized the establishment of AUM is not unconstitutional.

Since *ASTA*, there have been doctrinal developments inconsistent with the reasoning of the panel decision. First, the same three-judge court subsequently held that new

construction at the traditionally white junior colleges in Alabama could not be undertaken "until [the traditionally black] Mobile State Junior College has been transformed into a fully desegregated two year institution . . .". *Lee v. Macon*, 317 F.Supp. 103 (M.D.Ala.1970). Attendance at junior colleges, just as senior colleges, is "neither free nor compulsory."

More important are two post-*ASTA* higher education decisions. In *Norris v. State Council of Higher Education*, 327 F.Supp. 1368 (E.D.Va.1971), a three-judge court enjoined the escalation of a predominately white two-year state-supported college to a four-year degree granting college, where the effect would have been to impede the desegregation of a traditionally black college in close proximity. The court there expressly declined to follow ASTA; and the Supreme Court summarily affirmed. *Board of Visitors v. Norris*, 404 U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971).

More recently, in *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir.1979), the court implicitly rejected the ASTA reasoning when it affirmed a district court's decision to merge the predominately black Tennessee State University with the traditionally white University of Tennessee at Nashville. The Supreme Court denied certiorari in the case. 444 U.S. 886, 100 S.Ct. 180, 62 L.Ed.2d 117 (1979).

Further, the United States Office of Education, the agency charged with administration of Title VI now requires more than open admissions. As shown earlier, the ASTA reasoning was based in part on the fact that HEW, prdecessor of the Office of Education, "limited its concern to admissions policies in administering Title VI." 289 F.Supp. at 787. It is precisely the newer standards of the Office of Education which precipitated this lawsuit.

Finally, the *ASTA* court indicated that much of its ". . . discussions were based on speculation. . . ." *Id.* at 789.

The court assumed that ". . . as effective desegregation plans are developed in the elementary and secondary public schools, the problem will probably resolve itself in the case of higher education." *Id.*, at 790. Seventeen years later, the sad fact is that the problem has not resolved itself. Freedom of choice in higher education, as in public school desegregation, was perhaps a necessary first step in the effort to dismantle the dual school system. But having failed to work in dismantling the dual system of higher education, the *ASTA* approach must now give way to a desegregation plan that promises realistically to work. *Geier, supra.*

The contention that ASU and A & M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A & M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggests that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), makes it clear that as bodies corporate, ASU and A & M are "persons" within the meaning of 42 U.S.C. § 1983.

There is no jurisdictional bar to the assertion of cross-claims by ASU and AUM against the other defendants.

With respect to the § 1983 claims in this case, there is certainly no requirement of exhaustion of remedies. *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). In *University of*

California Regents v. Bakke, 438 U.S. 265, 283, 284, 98 S.Ct. 2733, 2744-45, 57 L.Ed.2d 750 (1978), the Supreme Court expressly did ". . . not pass upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies;" and the Court's attention has not been directed to any subsequent case in which the Supreme Court has addressed the issue. In any event, the resort to administrative remedies under Title VI (assuming the existence of such remedies) would prove futile or inadequate. To the extent that the defendants and the plaintiffs desired to reach a voluntary agreement in this case, they have had every opportunity to do so.

By separate order, the defendants shall be required to develop and submit to the Court a plan for the dismantlement of the dual system of higher education in this state.

ORDER

In conformity with the Memorandum of Opinion issued contemporaneously herewith, it is ORDERED that the defendants STATE OF ALABAMA, GEORGE C. WALLACE, THE ALABAMA COMMISSION ON HIGHER EDUCATION, and THE ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY shall submit to the Court, not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of higher education in Alabama.

The plan shall utilize the United States Office of Education's "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education", published in 43 Fed.Reg. 6658 (Feb. 15, 1978).* Livingston University, Jacksonville State University, the University of Montevallo, and the University of South Al-

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* [N.B. by petitioners. At a hearing on January 17, 1986, the district court orally eliminated this sentence.]

abama shall not be included in the plan. Troy State University (Main Campus), the University of North Alabama, and the University of Alabama (Tuscaloosa and Birmingham) shall be included in the plan only to the extent of faculty desegregation.

Within fifteen (15) days after the submission of the plan, the affected institutions shall submit their comments or objections to the plan. Such comments or objections shall be limited to a maximum of twenty-five (25) pages.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-7582

UNITED STATES OF AMERICA, et al.,
Plaintiffs-Appellees,
JOHN F. KNIGHT, JR., et al.,
Plaintiffs-Intervenors, Appellees,

v.

THE STATE OF ALABAMA, et al.,
Defendants,
THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama.

[Filed June 6, 1986]

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

JOHNSON, Circuit Judge:

We review here the district court's decision to enjoin the Alabama State Board of Education ("the Board") and

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

its members from refusing to recertify certain Alabama State University (ASU) teacher education programs. We REVERSE the district court's entry of the injunction against the Board and its members on behalf of ASU, and the entry of the injunction against the Board on behalf of a class of intervening plaintiffs. WE AFFIRM the entry of the injunction on behalf of these intervenors against the Board members acting in their official capacities.

I

The injunctive order at issue here arises from a July 1983 action originally filed by the United States under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 2000d et seq. (Title VI) against the state of Alabama, state education authorities, and all state four-year institutions of higher education in Alabama. This suit charged that Alabama impermissibly operates a dual system of racially segregated higher education.

The court below granted the motion of Alabama State University, a majority-black institution located in Montgomery, Alabama, to realign as a plaintiff. The court also permitted John F. Knight and other faculty, graduates, employees and students at ASU ("the Knight intervenors") to intervene as plaintiffs, and certified them as representatives for a class including graduates of ASU; black adults or minor children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions. As a realigned plaintiff, ASU raised several additional claims, seeking chiefly to challenge Alabama State Board of Education requirements for approval of certain teacher education programs. By joint motion, these issues were severed from the main statewide action and set for later trial.

Meanwhile, during the pendency of these proceedings, the state Board voted not to recertify certain undergrad-

uate and graduate teacher education programs at ASU. On motion by ASU and the Knight intervenors the district court enjoined the Board action to maintain the status quo pending resolution of the substantive questions before it and to preserve its jurisdiction. In reaching its decision the court below concluded that the Board's action was improperly retaliatory—that is, that the Board refused to recertify the ASU education programs in order to punish ASU for bringing suit. It is this injunctive order that comes before us for review.

II

We turn first to certain jurisdictional issues raised by appellant. The state Board argues that the district court did not have jurisdiction to grant ASU an injunction since the latter had no rights under Section 1983 or Title VI and, therefore, no standing to sue for protection of those rights. The Board does not challenge the standing of the Knight intervenors. Further, the Board of Trustees of the University of Alabama, as amicus curiae, urges that the district court was without jurisdiction to enjoin the state Board and its members since the state of Alabama and its agencies are immune from suit under the Eleventh Amendment to the United States Constitution.

Although the district court did not discuss these issues in the order before us,[1] we may examine our jurisdiction

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[1] In its memorandum opinion in the state-wide action, however, the lower court said:

> The contention that ASU and A&M are creatures of the State of Alabama and,as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 [102 S.Ct. 3187, 73 L.Ed.2d 896] (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State

sua sponte. *In Re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir.1985). Logic dictates that parties who seek a preliminary injunction in a suit must have standing to bring suit in the first place. Thus, our first inquiry is whether ASU or the Knight intervenors had standing to sue in the original action under either Section 1983 or Title VI. Second, we must decide, since a state agency is the party enjoined, whether the latter enjoys immunity under the Eleventh Amendment.

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

A line of Supreme Court cases including, e.g., *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923), and *Hunter v. City of Pittsburg*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that "public entities which are political subdivisions of a state" are "creatures of the state, and possess no rights, privileges or immunities independently of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254

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had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggested that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 [98 S.Ct. 2018, 56 L.Ed.2d 611] (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

(5th Cir.1976). However, the latter interpretation—which would bar any suit by a creature of the state against its creator—has not prevailed in this Court.

A subsequent Fifth Circuit decision binding on this Circuit has reviewed the Hunter line—including *Safety Harbor, supra*—and concluded that "these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state." *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir.1979), *cert. denied*, 444 U.S. 827, 100 S.Ct. 52, 62 L.Ed.2d 35 (1979). The Fifth Circuit panel relied in part on the Supreme Court's statement in *Gomillion v. Lightfoot*, 364 U.S. 339, 344, 81 S.Ct. 125, 128, 5 L.Ed.2d 110 (1960), that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the constitution considered in those cases." *Id.*

Thus, no per se rule applies in this Circuit.[2] In assessing the standing to sue of a state entity, we are bound by the Supreme Court's or our own Court's determination of

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[2] *Cf. City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1042, 101 S.Ct. 619, 621, 66 L.Ed.2d 502 (1980) (White, J., dissenting from denial of certiorari). Justice White indicated that a per se rule prohibiting a political subdivision from raising constitutional objections to the validity of a state statute was inconsistent with *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), in which one of the appellants was a local board of education.

But see City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir.1973); P. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System (2d ed.) 182 (1973), in which a per se rule is contemplated. *See also Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir.1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974), for an indication of the confusion surrounding this issue.

whether any given constitutional provision or law protects the interests of the body in question. However, if no such determination has been made, it is our task to review de novo whether the state entity has any rights under the particular rule invoked.

In the instant case, the law is clear that ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.[3] As long ago as 1939, the Supreme Court in *Coleman, supra*, 307 U.S. at 441, 59 S.Ct. at 976 (1939) (dicta), indicated that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." See also *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n. 1 (5th Cir.1984). ASU argues, however, that since the Supreme Court has more recently determined that municipalities and other local governing bodies are "persons" who may be sued under Section 1983, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1977), they are logically also persons who may bring suit under this section. The former Fifth Circuit, however, has squarely rejected this argument:

> The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to make municipalities and other political subdivisions amenable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal constitutional grounds.

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[3] By its terms, of course, Section 1983 itself creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. *City of Oklahoma City v. Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791 (1985). Thus, our focus here is directly on Fourteenth Amendment rights.

Appling City v. Municipal Elec. Authority of GA., 621 F.2d 1301, 1308 (5th Cir.1980), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).[4] We are bound by this decision, which extends logically to other creatures of the state such as state universities. ASU thus has no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment.[5]

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[4] *See also Commonwealth of Pa. v. Porter*, 659 F.2d 306, 327 n. 3 (3rd Cir.1981) (en banc) (standing recognized on other grounds): "[S]tates were never deemed to fall within the class of those for whom Congress created a remedy when it enacted § 1983. . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head."

[5] *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 102 S.Ct.3187, 73 L.Ed.2d 896 (1981), is not inconsistent with this position. There, a local school district challenged on Fourteenth Amendment grounds the constitutionality of a state initiative that sought to end the local school district use of mandatory bussing to achieve desegregation. The Supreme Court did not address the issue of the school board's standing to sue, although Justice Blackmun's opinion for the court did note that "[w]hile appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.* at 487-88 n. 31, 102 S.Ct. 3203-04 n. 31.

We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator. The former Fifth Circuit in *Rogers* explained that the *Hunter* line "adhere[s] to the substantive principle that the Constitution does not interfere with a state's internal political organization." *Rogers, supra*, 588 F.2d at 1070. But *Seattle School District* does not trench on a state's political prerogatives. It simply holds that once a state's political organization is in place, the state may only re-organize that structure (such as a state's delegation of certain educational decision-making powers to local school boards) consistently with the constitutional guarantee of equal protection. *See Seattle School District, supra*, 458 U.S. at 479-82, 102 S.Ct. at 3199-3201.

We turn next to the question of whether ASU has a right to sue the state under Title VI. To our knowledge, no court has decided this issue.[6] We conclude that no such right of action exists.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C.A. § 2000d. In *Hardin v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir.1985), *cert. denied sub nom. Grimmer v. Hardin*, ___ U.S. ___, 106 S.Ct. 530, 88 L.Ed.2d 462 (1985), this Court determined that state universities such as ASU are agents or instrumentalities of the state. Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation.[7] Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.

Our conclusion that ASU has no standing under Section 1983 and Title VI to seek the injunction *sub judice* does

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[6] We note that at least five justices determined in *University of California Regents v. Bakke*, 438 U.S. 265, 287, 98 S.Ct. 2733, 2746, 57 L.Ed.2d 750 (1978), that Title VI proscribes only those racial classifications that would violate the equal protection clause. However, we are not persuaded by this that, because ASU has no Fourteenth Amendment rights, it necessarily has no Title VI rights. The Court's analysis in *Bakke* makes it clear that a decision on Title VI grounds is, nevertheless, distinct from an exercise in constitutional interpretation. *See id.* 438 U.S. at 281, 98 S.Ct. at 2743.

[7] *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1957-58, 60 L.Ed.2d 550 (1978).

not end our inquiry. The standing of the Knight intervenors remains unchallenged. Thus, we must next determine whether or not their request for a preliminary injunction against the state board of education or its members is barred by the Eleventh Amendment. We hold that injunctive relief against the Board itself is so barred, but that such relief against Board members in their official capacities is permitted.

Again, we begin our analysis with Section 1983. In general, the Eleventh Amendment bars suits by citizens against a state.[8] Two exceptions to this rule apply: (1) a state may consent to suit in federal court, and (2) Congress may, under certain circumstances, abrogate a state's sovereign immunity. *Atascadero v. Scanlon*, ___ *U.S.* ___, *105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). One further doctrine, first set out in Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), permits state officials to be sued in their official capacities for prospective relief under certain circumstances, despite the Eleventh Amendment bar. *See Kentucky v. Graham*, ___ U.S. ___, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985).

The instant case does not fall under either of the first two exceptions. Alabama has not consented to suit under Section 1983. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1977) (per curiam). Further, the Supreme Court has held that Congress did not intend Section 1983 to abrogate a state's Eleventh Amendment immunity. *Graham, supra*, 105 S.Ct. at 3107 n. 17; *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358

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[8] The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), established that the amendment also proscribes suits by citizens against their own state.

educational station or translator. When more than one noncommercial station or translator qualifies for carriage on a cable system, the cable operator may choose the station or translator to carry. If no qualified noncommercial educational Station is located within a 50-mile zone of the cable system's headend and no translator of a noncommercial educational station is located in the cable community, then the system is exempt from must carry obligations.

151. Cable systems with more than 20 usable activated channels, but less than 27 such channels, are required to devote up to 7 channels to the carriage of qualified broadcast signals. Cable systems with 27 or more usable activated channels must devote up to 25 percent of their channel capacity To fulfill their mandatory carriage obligations. For purposes of determining the number of usable activated channels that would be allocated for qualifying must carry signals, calculations should be rounded to the nearest whole number. For example, a system with 44 usable activated channels would not have to devote more than eleven channels to must carry signals (i.e., 25% of 45 is 11.25 or 11 when rounded to the nearest whole number). A system with 46 such channels would be required to devote not more than 12 channels (i.e., 25% of 46 is 11.5 or 12 when rounded). Using this formula, systems with 21 to 29 usable activated channels would have to devote a maximum of 7 channels for must carry signals, those with 30 to 33 channels would have to allocate up to 8 channels, those with 34 to 37 channels would have to devote at most 9 channels, etc. A chart detailing the maximum number of channels that a system must devote to qualified must carry signals is set forth in the rules in Appendix B.

152. Further, cable systems with more than 20, but less than 54 usable activated channels, must allocate at least one must carry channel for the carriage of a qualified noncommercial educational station or translator, if at least

one such station is eligible for carriage. Cable systems with 54 or more usable activated channels must devote at least two of these channels to the carriage of qualified noncommercial educational stations or translators, assuming two or more such stations are available.

153. Where the number of qualified stations is less than or equal to the maximum number of channels that the system must devote to such stations, the cable system will be required to carry all qualified stations. There are two exceptions to this requirement. First, a cable system will not be required to carry duplicating commercial stations. That is, a cable system need not carry more than one station affiliated with the same commercial network. The decision to carry more than one affiliate of the same commercial network will be at the discretion of the cable operator.[108] Further, in cases where both a satellite and its parent television station qualify for carriage, the cable system need not carry both stations and may choose between them. We note that There will be no similar exemption from the carriage of noncommercial educational stations that are affiliated with the same network.[109] However, cable systems will not have to carry a noncommercial station

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[108] For example, if a cable system has 25 usable activated channels, it must devote a maximum of 7 channels to stations that qualify for must carry rights. If 2 ABC affiliates, 1 CBS affiliate, 1 NBC station, 2 independents, and 1 PBS station qualify for carriage on this system, then the cable operator would be able to decide whether to carry one or both of the ABC affiliates and must carry each of the other qualified stations.

[109] As commenters have indicated, affiliates of noncommercial educational networks rarely broadcast substantial portions of their programming simultaneously. Therefore, the carriage of more than one noncommercial educational station affiliated with the same network generally adds to viewer choices. However, the Commission will consider granting exemptions to this requirement in those situations where it can be shown that there is a consistently high degree of simultaneous program duplication.

and its satellite or translator station(s).[110] Second, a cable system will be permitted not to carry an otherwise qualified station that is considered a distant signal for copyright purposes. This situation could occur because the proposed 50-mile zone in some cases creates over an area that is larger than its rights under the former must carry rules and there is a possibility that a station could qualify for carriage under the revised must carry rules and be considered a distant signal under the Copyright Act. If the system carries a station that is subject to this exception, the system is permitted to count the station in determing whether the system's limit on carriage of qualified stations has been satisfied.

154. Where the number of qualified broadcast stations exceeds the maximum number of channels that a cable system is required to devote to must carry signals, the cable system may choose among the qualifying stations, subject to the requirements for carriage of qualified noncommercial educational stations or translators. There is no requirement that the cable operator select at least one station affiliated with each of the major commercial networks.

155. *Manner of Carriage.* Cable systems will be required to carry qualified broadcast signals that are carried in fulfillment of must carry obligations in their entirety without material degradation, as part of their lowest-priced, separately available tier of service.[111] By carriage in their entirety, we means that the cable system must carry the primary video and accompanying audio transmissions of all

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[110] Similarly, a cable system will not have to carry two or more translator or satellite stations that duplicate the same parent station.

[111] However, the rules relating to the requirement that programs on distant signals be carried in full, but that entire signals need not be carried in full, were not the subject of this proceeding and, therefore, remain unchanged. *See* 47 CFR 76.55(b). This section of the rules is being recodified as §76.62(a), pursuant to our decision herein.

programs in full, without deletion or alteration. Retransmission of any ancillary services in the vertical blanking interval or aural baseband, including but not limited to multichannel television sound and teletext, will be at the discretion of the cable operator. The rules do not require a cable system to provide onchannel carriage of any qualified station. A cable operator may carry qualified broadcast stations on any channel or frequency, so long as those carried in fulfillment of any must carry obligation are carried on the lowest-priced, separately available tier of service offered by the cable system.

156. Changes in the network nonduplication rules were not a part of this proceeding and are not being changed substantively herein.[112] As a consequence of this, situations may arise in which signals that are defined as "qualified" for mandatory carriage under the transitional must carry rules may be subject to partial deletion under the network nonduplication rules. The rules specifically account for this possibility. In this respect, cable systems will not be required to extend network nonduplication protection to qualified stations that they are otherwise not required, and choose not, to carry.

157. Cable systems will be prohibited from accepting any payment or other consideration from qualified stations carried in fulfillment of must carry obligations with two limited exceptions.[113] First, qualified stations carried to fulfill must carry requirements will be allowed to reimburse a cable operator for any copyright fees associated with the station's carriage. Second, such broadcast stations will be permitted to pay any costs related to the requirement that they deliver a good quality signal to the cable system's

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[112] *See* 47 CFR 76.92-99.

[113] This prohibition does not apply to nonqualified stations or those otherwise qualified stations that are carried but whose carriage does not serve to fulfill must carry obligations because there are an excess number of qualified signals in the market.

headend, including the cost of installing additional receiving or transmitting equipment and of using CARS or common carrier microwave links. We recognize that the requirements stated in this paragraph are different from those proposed in the industry agreement.

158. A broadcast station seeking carriage as a qualified must carry signal will bear the burden of establishing this right. A broadcaster that believes its station is qualified for mandatory carriage rights must submit a request for carriage in writing to the cable operator and include sufficient evidence to demonstrate that its station meets the criteria set forth in the rules. Within 30 days of receiving a request for carriage, a cable operator must provide the broadcaster with a written response. If the cable system declines carriage of the requesting station, it must give a brief statement of the reasons for its decision. A cable system that refuses a request for carriage, but complies in good faith with these requirements, will not be subject to any forfeiture or other penalty if it is later determined that the station is entitled to carriage.[114]

159. In general, we are hopeful that broadcasters and cable operators will be able to determine carriage rights without the intervention of the Commission. However, in instances where the broadcast station and the cable system cannot agree on the station's must carry rights, the broadcast station requesting carriage may petition the Commission fore a determination of its rights. The petitioning station will bear the responsibility of convincing the Commission that it satisfies the mileage and viewership standards and that the cable system is not otherwise carrying its limit of qualified television stations. Where a cable operator refuses to carry a station on the ground that the station does not deliver a good quality signal to the sys-

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[114] If a new station is involved, the 12-month exemption from the audience share requirement will not run during the period of dispute resolution if the station is not being carried.

tem's headend, the station will bear the burden of proving with appropriate engineering data that it meets this requirement. If the Commission determines that a station is entitled to carriage, it will then order the cable system to add the station. A cable system may be assessed a forfeiture or other penalty for failure to comply with a Commission order to carry a qualified broadcast station. Commission action in such cases will also include action by the Mass Media Bureau under delegated authority.

The New Rules Meet the Need for Regulation

160. The new regulatory program we are adopting is intended to protect and further the federal interest in maximizing consumers' viewing choices. The first objective of this plan is to alter the manner in which consumers have permitted their independent access to off-the-air broadcast signals to be limited once they subscribg to cable. Consumers who can receive signals both via cable and off their antennas will have their program choices maximized. We, therefore, seek to prohibit cable Systems from diminishing the off-the-air reception capability of new subscribers, and to require them to aid existing subscribers in regaining their off-the-air reception capability. To this end, consumers will be educated on the need to maintain the capability To receive broadcast signals independent of their cable system, will be instructed as to how to do this, and will receive an input selector switch to enable them to connect an antenna in conjunction with their cable service.

161. We have determined that a requirement for cable systems to offer an input selector switch and consumer information to their subscribers is warranted as the appropriate long-term policy to ensure that viewers retain both the awareness and capability to receive signals off-the-air. We find that rules enhancing the availability of input selector switches to viewers and the dissemination of information concerning their need and purpose will help

attain the important governmental interest of maximizing the program choices available to the public. In this regard, the maximization of cable subscribers' program, choices is furthered by ensuring the opportunity to receive all off-the-air broadcast signals as well as cable offerings. Indeed, their choices are then increased if not all off-the air signals are duplicated on cable, but, rather, cable channels are freed up for other programming that viewers are unable to receive off-the-air. The capability to receive signals directly off-the-air, which will be facilitated by these switches, also is beneficial in that it will preserve subscribers' ability to receive broadcast signals in the event of outages of cable service and will provide a means for access to ancillary services, such as teletext, that may not be carried by the cable system.[115]

162. Noncable subscribers' viewing choices also will be substantially enhanced to the extent that cable subscribers use input selector switches to access all off-the-air broadcasting, thereby increasing broadcast station audiences and revenues. In addition, even rural viewers who must rely on television receive only (TVRO) satellite equipment will have their viewing choices substantially enhanced by this requirement, as increased cable channel capacity for satellite programmers can be expected to provide a spur to the economic market of such programmers, thereby increasing the likelihood that additional satellite programming will be developed.

163. We are confident that the switch requirement, coupled with the consumer education program, will ensure that all cable subscribers become aware of the need for

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[115] In light of both our prior determination that services on the VBI and the aural baseband are secondary in nature and our recognition of cable operators' First Amendment rights, we believe it is not appropriate to require carriage of these signals. *See Report and Order* in MM Docket 84-168, 50 FR 4658 at para. 10 (1985); *see also Second* Report and Order in Docket No. 21233, 49 FR 18100 at para. 25 (1984).

off-the-air reception capability and have the opportunity to acquire such capability. In this respect, our previous concerns that input selector switches would be inconvenient and? therefore, not used by consumers, no longer appear valid in the context of the search for acceptable solutions that are minimally intrusive on cable operators' editorial discretion in the post-*Quincy* environment. We are convinced that once cable subscribers become accustomed to using off-the-air reception on an equal basis with cable service, then cable systems no longer will have an artificial ability to limit their subscribers' access to over-the-air broadcast signals.

164. There is evidence that video consumers are now becoming accustomed to switching between alternate program input sources. We observe that many cable systems now offer services through dual cables in order to provide greater channel capacity.[116] Such systems employ switching devices to select between the two cables and often mark the switch positions with "A" and "B" designations. Cable subscribers apparently have accepted this switching arrangement and do not find it inconvenient. In addition, cable systems operating with two cables often provide their subscribers with remote control converter devices that permit selection of the cable as well as the channel to view.[117] We note that consumers also have become familiar with switching between alternative program sources through use of VCRs. We believe that switching between cable and off-the-air reception is essentially the same as these existing program source switching options and that consumers will accept cable/broadcast input switching as simply another program source option. We have no evidence that cable

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[116] All cable systems offering more than 609 channels of service use dual cable operation.

[117] Converter devices that provide for remote switching between "A" and "B" cables are now being manufactured by Zenith Radio Corp. and Jerrold Division, General Instruments Corp.

subscribers will not accept such a result where the alternative is a regulatory regime that infringes on cable operators editorial discretion. Indeed, it was exactly this kind of assumption that led the court in *Quincy* to strike down our former rules.

165. We are aware that some broadcasters are concerned that input selector switches would not be a satisfactory means for ensuring that cable subscribers have independent access to broadcast stations. We believe that many of these concerns are overstated and that the rest can be mitigated or resolved by development and improvement of new and existing input selector switches to meet particular needs. We decline to reject a solution which we have concluded will achieve our goal in a manner that is least intrusive on editorial discretion and that is conducive to maximization of viewer program choice on the basis of minor technical considerations that can be resolved through equipment redesigns. In the past, there has been no incentive to develop input selector switches to meet a variety of different technical demands because few consumers had reason to use such devices. Our recognition that there may be room for improvement in the technology of input selector switches is, however, one of the reasons why we are continuing our interim must carry rules for five years.

166. Broadcasters argue that input selector switches would not provide effective off-the-air reception because very few cable subscribers have maintained outdoor antennas and local regulations and/or multi-unit residences in many cases preclude installation of such antennas. Our five-year interim rules are specifically designated to ensure access to local broadcasting in the period before it can be reasonably expected that subscribers can regain their off-the-air accessibility. The relatively low cost and simple installation of indoor antennas can be expected to make it easy for cable subscribers to acquire the capability to receive broadcast stations not carried on cable. The argument that outdoor antennas are sometimes prohibited

ignores the fact that in many of these situations it is possible to receive signals of acceptable quality using an inexpensive indoor, set-top antenna. This is particularly the case where subscribers are located within the Grade A signal of the station. While indoor antennas would not prove satisfactory in all such cases, we believe their use can significantly mitigate the antenna availability problem. Attic antennas which can give additional off-the-air reception capability are also available. The consumer education program required under the new rules will encourage cable subscribers to acquire and maintain antennas for off-the-air reception of television signals, be they of outdoor, attic, or indoor designs.

167. As broadcast commenters observe, use of input selector switches in conjunction with VCRs may pose installation complexities and in some cases may require use of additional equipment. We believe that any equipment compatibility problems can be overcome through relatively minor modifications to switching devices and that cable operators and other equipment suppliers can provide the information and/or assistance consumers may need to install the switches for use with VCRs. We also believe that the problems with respect to use of input selector switches in conjunction with cable-ready receivers can be overcome through proper matching of the switches with the input requirements of the receivers. We note further that many of these concerns may become moot if television receivers begin to be manufactured with switching or interface devices built in.

168. We also recognize broadcasters' arguments that many cable operators now encourage subscribers to disconnect their antennas and/or offer to assist in removing them. We consider this practice to be inconsistent with our federal objectives and, therefore, are including provisions in the new rules to require cable operators to inform their subscribers that an antenna may be necessary to receive broadcast television services and to prohibit them

from promoting abandonment of off-the-air reception capability.

169. In order to achieve the long-term of maximizing program choices to all viewers, we need to preserve cable subscribers' access to broadcast programming and to ensure that broadcast television remains a competitive alternative source of programming during the transition to the new environment. The interim must carry rules will meet this objective by preventing disruption of the flow of television services to the public during a five-year implementation period and by facilitating an orderly transition to a new market environment in which must carry regulation is no longer necessary because consumers have both the awareness and capability to use switching devices to alternate between cable and broadcast program sources.

170. As discussed above, preservation of commercial broadcasting as a competitive alternative source of programming during the transition to an environment without must carry rules is essential to The federal interest of maximizing program choices to all viewers. In this regard, we believe that the 50-mile zone/viewing standard formula for defining the qualified status of commercial stations will ensure that viewers have access to the most popular stations available off-the-air in the cable community. In addition, the exemption from the viewing standard for commercial stations that have been on-the-air for less than one year affords new stations an opportunity to gain a foothold in the market, Thereby furthering our interest in maximizing program choices by fostering entry into the market. On the other hand, the interim must carry rules will provide cable systems with opportunity to tailor their program service offerings to viewer preferences. In this respect, the rules limit the portion of a cable system's available channel space that is to be devoted to mandatory carriage of broadcast signals in a manner that will permit all cable operators with opportunity to provide programming from other sources.

171. While we recognize that to exempt cable systems with 20 or fewer channels from any obligation to carry commercial stations does not serve to further our goal of protecting the broadcast service during the transition period, we nonetheless believe that this is necessary in view of the strong constitutional concerns that must be balanced against any must carry regulation. However, we do not expect that this exception will substantially affect the achievement of the objectives of our transition policy. In this regard, we note that at this time, only 31 percent of all cable systems, serving 23 percent of all subscribers, have less than 20 channels.[115] We expect that these proportions will decrease during the five-year period as these generally older cable systems respond to consumer demand for additional program services and rebuild using state-of-the-art equipment. We also believe that the provision for proportional increases in signal carriage requirements for larger cable systems based on their individual channel capacity and the exemption from required carriage of duplicate network signals adequately balances the need to ensure an orderly transition to a new environment without must carry rules with the need to protect the cable operators' opportunities for exercising their editorial discretion.

172. We also have modified the industry agreement to provide mandatory carriage protection for noncommercial educational stations. We recognize that some cable systems with 20 or fewer channels may consider it an imposition to carry one noncommercial station. However, the federal interest in ensuring the continued accessibility to and availability of the alternative programming provided by noncommercial educational stations is sufficiently important to warrant the imposition of such a requirement in the interim period. In this respect, we believe that the public

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[115] "1985 Television and Cable Factbook," Cable and Services Volume No. 53, at 1385.

interest Value of noncommercial educational broadcasting justifies requiring cable systems with 54 or more channels to carry at least two qualified noncommercial broadcast or translator stations. The provision for carriage of noncommercial translators, as proposed by Senator Danforth, will ensure the availability of noncommercial television service to cable subscribers in areas unable to support a full service station. In view of the proportional manner in which this requirement is imposed, which is similar to the requirement concerning carriage of commercial broadcast stations, we believe that here too we have struck an appropriate balance between the competing needs to provide access to noncommercial educational programming and to protect cable operators' opportunities for exercising their editorial discretion during the five-year interim period.

Alternative Proposals Considered and Rejected

173. In developing our policy decision in this matter, we considered a wide range of policy options, including the various proposals submitted by the petitioning and commenting parties in this proceeding. We have incorporated many of the specific features of these proposals, or modifications thereof, into the new rules. However, we also have rejected many other proposals on the grounds that they would exceed our statutory authority, would be overly intrusive on cable operators' editorial discretion, or simply would not meet our regulatory objectives as well as the plan we have chosen. In order to provide additional insight into our policy decision, we believe it is useful to indicate our reasons for rejecting the major alternatives presented in the record.

174. One alternative approach, proposed by Richard Leghorn, with respect To the input selector switch requirement, would be to require that all new television receivers be built with integral switches for selecting between cable and off-the-air television service. The attractive feature of this approach is that it would assure that, over

time, all viewing households would have the capability to switch between cable and off-the-air service without The need fore a requirement that a switch be provided by the cable system. However, we have rejected this option on the basis that it is ultimately an inefficient means to distribute input selector capability. The need for cable/broadcast input selector capability pertains only to those consumers that subscribe to cable service; noncable subscribers have no need for such capability. We see no need to impose the additional cost of a built-in selector switch on consumers who have no need or desire for it.[119] Thus, we do not find it desirable to require all receivers to be built with a feature intended for use by only approximately one half of the TV households nationwide. In addition, cable subscribers purchasing cable-ready receivers may prefer a more sophisticated independent stand-alone input selector device, and thus, not have need for such capability to be built into their receiver. In view of these considerations, we believe that market forces are the most appropriate means to lead the television receiver industry to produce sets equipped with capability to switch between cable, broadcast, and other program sources. In this respect, market forces will determine both the number of sets to be equipped with input selector features and the specific design of those features.

175. As described above, Mr. Leghorn also proposes to exempt cable systems from requirements to provide input selector switches to their subscribers if they carry all local VHF signals. This proposal is attractive in that it would provide a way to minimize the impact of our new program on the cable industry without significantly altering the mix of services offered by individual cable systems from that

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[119] In this respect, we recognize that the costs of the input selector switches that cable systems will be required to provide under the new rules are likely to be borne ultimately by cable subscribers through higher service rates.

which could be expected to obtain under the plan we have chosen. In this respect, we observe that most cable systems already carry all of the local VHF stations, and because these stations are generally popular with viewers, would continue to so in the absence of regulation. However convenient this approach might be for both the cable and broadcast industries, it nonetheless would be directly contrary to our stated goals to correct the misperception that has resulted from our former must carry rules and to provide a regulatory environment that will maximize viewers" access to video programming. To provide regulatory encouragement for cable systems to carry all of the local VHF stations would tend to perpetuate the misperception that it is not necessary for cable subscribers to maintain independent off-the-air reception capability. Such a policy also would hinder the attainment of our program access goals by providing a strong incentive for cable systems to devote a portion of their channel package to a fixed package of services rather than encouraging them to tailor their service directly to viewer interests. We also observe that carriage of all VHF signals would not ensure access to all of the available off-the-air signals for subscribers using cable ready receivers because such receivers generally disable their UHF antennas when operated in the cable ready mode. Finally, a policy that offered strong incentive to cable systems to carry all of the local VHF signals would operate in a manner much the same as our former must carry rules and thus would impose the same type of overintrusive, nondiscriminatory regulatory protection ruled constitionally unacceptable by the court in the *Quincy* decision.

176. The proposals of NTVE and Grace Cathedral would provide strong incentives for cable systems to carry broadcast stations by conditioning the availability of the cable compulsory copyright license on carriage of all local stations. Similarly, CBS's proposal to require cable systems to obtain retransmission consent from originating stations,

except from local stations where all such stations are carried, potentially would conflict with the cable compulsory copyright license. Regardless of our authority in this area, an issue which we need not reach here, the NTV, Grace, and CBS proposals would reimpose broad must carry rules that would be difficult to sustain under the *Quincy* decision. Therefore, as a policy matter, we find these proposals unacceptable.

177. Other proposals for new must carry rules, such as those submitted by the Catholic Conference and UCC, attempt to meet the constitutional concerns of the *Quincy* court by extending carriage rights only to limited classes of local television stations that they believe are a risk or that offer specific kinds and/or amounts of local program service. These proposals are designed to protect certain classes of local broadcast stations and to further local broadcast television service consistent with our previous cable signal carriage policy. They are not well suited to the current need for must carry rules during the transition to the new regulatory environment and would, in fact, tend to hinder rather than promote viewer access to the maximum program choices in the interim period. In this respect, policies that promote the carriage of specific types of programming generally hinder a cable system from carrying the services its subscribers most desire to watch. Such regulation also is more intrusive on cable operators editorial discretion than the rules we are adopting.

178. We find that the proposal to reimpose restrictions on cable carriage of distant broadcast signals in larger markets submitted by Henry Geller and Donna Lampert in their petition for rule making field subsequent to the *Quincy* decision[120] raises issues generally outside the scope of this proceeding. We intend to address the distant signal and syndicated exclusivity issues in future proceedings.

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[120] *See* Notice at footnote 6. .

179. Finally, we do not believe that it is appropriate at this time to eliminate the existing network nonduplication rules as proposed in the industry agreement. This proceeding is focused on the mandatory signal carriage rules and, therefore, is not an appropriate forum for addressing whether the network nonduplication rules should be retained or eliminated. As discussed below, we intend to initiate a separate proceeding to fully address the issues in the network nonduplication matter.

CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

First Amendment Issues

180. *Standard of Review.* The threshold issue in reviewing the constitutionality of any mandatory carriage requirement is the appropriate standard of review. While the United States Supreme Court has expressly recognized that cable television operators engage in conduct protected by the First Amendment,[121] it has not definitively addressed the appropriate standard[122] to be utilized in evaluating the constitutionality of cable regulation.[123] In the

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[121] *City of Los Angeles and Department of Water and Power v. Preferred Communications, Inc. (Preferred),* 106 S.Ct. 2034, 2035 (1986).

[122] While The issue has been raised by the parties in several cases, the Supreme Court has never resolved the issue concerning the applicable First Amendment standard governing cable television. *See Preferred, id.; Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984); *Midwest Video Corp. v. FCC,* 440 U.S. 689, 709 n.19 (1979).

[123] Certain parties in this proceeding have urged the Commission to employ a functional analysis of the particular aspects of cable service in assessing the First Amendment implications arising from reimposition of a mandatory carriage requirement. While acknowledging that the program origination functions of cable operators qualify for full First Amendment protection, these parties argue that the First Amendment rights of cable operators, in performing the function of retransmitting local broadcast signals, are either minimal or nonexistent. *See, e. g., Comments of National Broadcasting Co. (filed Jan. 29, 1986). The*

absence of explicit Supreme Court guidance, the lower federal courts have employed divergent tests and the matter remains unsettled.

181. Several appellate courts have determined that there are special characteristics of cable television which warrant the application of a special standard of scrutiny that differs from and is lower than the one governing the print media. For example, in *Omega Satellite Products Co. v. City of Indianapolis* (Omega Satellite).[124] the Seventh Circuit applied a lower standard of scrutiny analogous to the one applied to broadcasting services,[125] in reviewing the constitutionality of cable regulation. The court articulated three reasons for rejecting the print model as the appropriate standard of review. First, while noting that spectrum scarcity does not exist for cable services, the court stated that "cable television involves another type of in-

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United States Supreme Court recently stated, however, that cable operators "through original programming or by exercising editorial discretion over which stations to include in its, repertoire . . . implicate first amendment interests." Preferred, 106 S.Ct. at 2035. Thus, not only did the Court indicate that both the programming and retransmission functions of a cable operator are entitled to First Amendment protections, but in so stating the Court made no distinction as to the quantum of protection afforded to the operator on the basis of whether it performs an origination or retransmission function. *See also Omega Satellite Products Co. v. City of Indianapolis (Omega Satellite),* 694 F.2d 119, 127 (7th Cir. 1982) (cable system "engaged in the dissemination of speech within the meaning of the First Amendment, both by transmitting programs originated by television stations and cable television networks and by originating its own . . . programs."); *Tele - Communications of Key West, Inc. v. United States,* 757 F.2d 1330, 1336-37 (D.C. Cir. 1985) ("Whether or not TCI [the cable operator] produces any original programming of its own, its activities of transmitting and packaging programming mandate that it receive First Amendment protection."); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 898 (W.D. Mo. 1985), *aff'd* 800 F.2d 711 (8th Cir. 1986).

[124] 694 F.2d 119 (7th Cir. 1982).

[125] *See, e. g., Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969).

terference — interference with other users of telephone poles and underground ducts."[126] Second, it determined that there were "apparent natural monopoly characteristics of cable television"[127] which justified the application of a different lower standard of scrutiny. Third, citing *FCC v. L Pacifica Foundation* (Pacifica),[128] a case involving traditional broadcasting services, the court indicated that "the universal access to the home that television enjoys and a resulting felt need to protect children"[129] warranted application of a lower constitutional scrutiny standard.

182. Similarly, the Tenth Circuit, in *Community Communications Company v. City of Boulder Colorado*,[130] expressly determined that "[t]he attributes of cable broadcasting technology"[131] justify the application of a distinct and more relaxed standard[132] in assessing the constitutionality of cable regulation than is employed in evaluating governmental restrictions on the press.[133] In

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[126] *Omega Satellite*, 694 F.2d at 127.

[127] *Id.*

[128] U.S. 726 (1978).

[129] *Omega Satellite*, 694 F.2d at 128.

[130] 600 F.2d 1370 (10th Cir. 1981), *cert. dism.* 456 U.S. 1001 (1982).

[131] 660 F.2d at 1377.

[132] While the Tenth Circuit explicitly determined that it was inappropriate to utilize the strict First Amendment standard of review governing the regulation of the press in cases involving cable regulation, it declined to address whether "the full panoply of principles governing the regulation of wireless broadcasters necessarily applies to cable operators." *Id.* at 1379.

[133] The Tenth Circuit was persuaded that two characteristics of cable television distinguished it from the print media. First, in contrast to the manner in which a newspaper disseminates its message, the court stated that:

> a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disrup-

applying a lenient standard, the Tenth Circuit indicated that governmental regulation could be justified in order to assure "that optimum use is made of the cable medium in the public interest."[134]

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tion especially to streets, alleys, and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain.

Id. at 1377-78. Second, the court stated that "the physical and economic limitations on the number of cable systems that can practicably operate in a given geographic area" differentiate cable from the press. *Id.*

[134] *Id.* at 1379. Other federal courts have also adopted a lenient constitutional standard. In *Hopkinsville Cable TV v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982), a district court held that a cable system is a "natural monopoly" which justifies the award of an exclusive franchise by a municipality. *But cf. Carlson v. Village of Union City, Michigan*, 601 F. Supp. 801 (W.D. Mich. 1985), in which another district court in the Sixth Circuit applied the balancing test prescribed in *United States v. O'Brien (O'Brien)*, 391 U.S. 367 (1968).

Perhaps the opinion applying the most lenient standard of review to cable regulation is *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968), in which the Eighth Circuit, expressly extending the "physical scarcity" rationale to cable Television, explicitly applied the lenient broadcast standard in upholding the constitutionality of a number of cable regulations, including mandatory carriage rules. While the Eighth Circuit has never expressly repudiated *Black Hills Video*, nonetheless it is unclear that *Black Hills Video* continues to reflect the law in the circuit. In *Midwest video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979), the Eighth Circuit virtually ignored its earlier decision, and in dicta, appeared to endorse a more stringent constitutional standard for cable television. In light of *Midwest Video*, at least one court has concluded that *Black Hills Video* "is a doubtful precedent today." *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985), *aff'd on other grounds sub nom. City of Los Angeles and Department of Water and Power v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986). Further, a district court in the Eighth Circuit has recently applied a standard of review which appears to be inconsistent with the 1968 *Black Hills Video* decision. *Central Telecommunications v. TCI Cablevision, Inc.*, 610 F. Supp. 891 (W.D. Mo. 1985), *aff'd* 800 F.2d 711 (8th cir. 1986).

183. More recently, other federal circuit courts have expressly repudiated the notion that there are specific attributes of cable television which would warrant use of a lower constitutional standard of scrutiny. For example, in applying generally applicable First Amendment standards for cable television, the District of Columbia Circuit in *Quincy Cable TV, Inc. v. FCC* (Quincy)[135] emphasized that a "fundamental significant"[136] distinction between broadcasting and cable is that the former is subject to the physical limitations of the electromagnetic spectrum.[137] Emphasizing that "the 'scarcity rationale' has no place in evaluating government regulation of cable television"[138] and that "the analogy to more traditional media is compelling,"[139] the court concluded that the broadcast standard of scrutiny was inapposite in evaluating the constitutionality of cable regulations. The court found unpersuasive arguments that the alleged natural monopoly characteristics of cable television[140] of the potential disruption at-

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[135] *Quincy, supra*, n.2.

[136] *Id.* at 1448.

[137] The United States Court of Appeals for the District of Columbia Circuit has consistently rejected the application of a broadcasting standard to cable television on the grounds that spectrum scarcity does not exist in the context of cable television. For example, nine years ago, in *Home Box Office, Inc. v. FCC*, 567 F.2d 944-45 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), the District of Columbia Circuit expressly stated that the traditional First Amendment standard applied to broadcasting services "cannot be directly applied to cable television since an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent."

[138] *Quincy*, 768 F.2d at 1449.

[139] *Id.* at 1450.

[140] The court set forth three reasons for this conclusion. First, it expressed skepticism, as a factual matter, that cable operators are in an economic "position to exact monopolistic rents." *Id.* Second, it asserted that "the tendency toward monopoly, if present at all, may well be attributable more to governmental action—particularly the municipal

tendant upon stringing coaxial cable in a public right of way would justify use of a lenient standard of review.[141] The Ninth Circuit, in *Preferred Communications, Inc. v. City of Los Angeles*,[142] has also recently rejected the application of the lower broadcasting standard of scrutiny to cable television for many of the same reasons articulated by the District of Columbia Circuit.

184. Given the unsettled nature of the law in this area, as reflected in the cited judicial opinions, there is no single standard absolutely compelled by case precedent. Nonetheless, we find persuasive the more recent court analyses which conclude that cable's First Amendment rights are subject to a stringent review, rather than the relaxed review used by courts for broadcasting.[143] We do not find

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franchising process—than to any 'natural' economic phenomenon." *Id.* Third, each assuming, *arguendo*, the existence of the "natural monopoly" characteristics of cable television, the court was unpersuaded that purely economic constraints on the number of voices available in a given community would justify the constraints upon First Amendment freedoms. *Id.*

[141] In this regard, the court stated That:

> [t]he potential for disruption inherent in stringing coaxial cables above city streets may well warrant some governmental regulation of the process of installing and maintaining the cable system. But hardly does it follow that such regulation could extend to controlling the nature of the programming that is conveyed over that system.

Quincy, 768 F.2d at 1449.

[142] *Supra* n.132.

[143] Because cable systems do not directly utilize the electromagnetic spectrum, the traditional justification for the application of a lower standard in evaluating the constitutionality of broadcast regulation—spectrum scarcity—simply does not apply to cable television. The three federal circuit courts addressing this issue in the past two years have employed a stricter First Amendment test in assessing the constitutionality of cable regulation. *Quincy, supra; Preferred, supra; Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985). Recent district court decisions

that the rationales for applying a lower First Amendment scrutiny standard analogous to that adopted for broadcasting in *Red Lion Broadcasting Co. v. FCC*,[144] are persuasive or are sufficiently likely to prevail on review that regulations should be based thereon.[145]

185. Rejecting a lower standard of scrutiny based upon the allegedly "unique" characteristics of cable television does not decide the issue of whether the rules adopted in this proceeding comply with the First Amendment.[146] In determining whether or not a governmental regulation comports with the strictures of the First Amendment, the courts have differentiated between governmental actions imposing incidental burdens on speech and those which are content-based. Whereas the former are assessed under the balancing standard enunciated in *United States v. O'Brien*

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have also enunciated constitutional tests which carefully scrutinize governmental actions affecting the First Amendment rights of cable operators. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). *See generally Central Telecommunications, Inc. v. TCI Cablevision, Inc., supra* n.101. *See Carlson v. Village of Union City, Michigan, supra n.132.*

[144] *Supra n.123.*

[145] Indeed, as the court in *Quincy* noted,

> [T]echnological advances may have rendered the "scarcity rationale" obsolete even for broadcasters. . . . [And while] [t]he Supreme Court recently suggested . . . that it was not prepared to reconsider its "long-standing approach" to the broadcast medium. . . . it made clear that [a] law . . . would receive far more exacting scrutiny if it were directed at non-broadcast speech.

Quincy, 768 F.2d at 1449, n.32 (citations omitted).

[146] As the District of Columbia Circuit recognized in *Quincy*, such a determination by itself "does not, of course, suggest that the First Amendment interposes an impermeable bulwark against any regulation."
Quincy, 768 F.2d at 1450.

(O'Brien),[147] content-based regulations are subject to a far more stringent standard.[148] Before the constitutional permissibility of the mandatory carriage regulations we adopt today can be assessed, therefore it must be determined which standard is applicable.

186. The *Quincy* court acknowledged that the Commission's former must carry rules were not intended to suppress or protect any particular viewpoint. *Quincy*, slip op. at 35.; Nevertheless, the Court "had serious doubts" whether the rules should be evaluated under the *O'Brien* standard because of the nature of the First Amendment intrusions they effected. The court focused on the rules' effect on cable operators' editorial autonomy and noted that they were designed to favor one group of speakers (local broadcasters) over another (cable programmers). The Court was especially concerned that, in systems substantially occupied by mandatory signals, cable programmers are shut out entirely from the only forum capable of carrying their programming, *Id.* at 36, "even if that result directly contravenes the preference of cable subscribers." *Id.* at 39.

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[147] *Supra n.132.*

[148] *See e.g. Miami Herald Publishing Co. v. Tornillo (Miami Herald)* 41 U.S. 241 (1974). As the court in *Quincy* stated, certain content-based regulations appear to be impermissible *per se:*

> [I]f *Miami Herald* supplies the appropriate mode of First Amendment analysis, our inquiry would be at an end without any need for testing against the other *O'Brien* factors or applying any other form of interest balancing. In *Miami Herald* . . . [w]ithout so much as alluding to even the possibility of a subordinating governmental interest, the Court invalidated the statute.

Quincy, 768 F.2d at 1453 (footnotes omitted). Other supreme Court cases, however, have indicated that content-based restrictions will be measured under a compelling state interest standard. *See e.g., Pacific Gas and Electric Co. v. Public Utilities Commission of California (Pacific Gas)*, 106 S.Ct. 903 (1986).

187. Subsequent to the Court of Appeals' decision in *Quincy*, the Supreme Court has again given guidance on how to analyze whether a particular regulation is content-based. In *lCity of Renton v. Playtime Theatres, Inc. (Renton), 106 S. Ct. 925 (1986), the Court upheld as content-neutral a zoning regulation that imposed more stringent requirements upon adult theatres than upon other kinds of theatres. The regulation clearly had the effect of discriminating between classes of speakers; nevertheless, the Court determined that the Renton* ordinance was "completely consistent" with the Court's definition of content-neutral speech regulations because the ordinance "was *justified* without reference to the content of the regulated speech." *Id.* at 929 (emphasis in original).[149] In other words, the Court focused not on the incidental First Amendment effects of the regulation, but on the fact that the ordinance's primary *purpose* was not content-based. *Renton* thus indicates that the fact a regulation distinguishes between classes of speakers is not dispositive of its content-neutral or content-based status; rather the Court's analysis centered on the purposes underlying the regulation. Where the regulation is not designed to promote or suppress particular *viewpoints*, it is deemed content-neutral.[150] As the Court noted, this approach is fully consistent with the First Amendment's underlying purpose; namely to ensure that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those

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[149] The Court concluded that the regulation was designed to prevent the second effects of adult theatres on the surrounding community; namely, to prevent crime, protect the city's retail trade, maintain property values, and generally preserve the quality of the city's neighborhoods. Id. at 4162.

[150] Like the court in *Quincy*, we recognize that the same *O'Brien* test would apply to newspapers in assessing the constitutionality of a content-neutral rule. See Quincy, *supra*, at 1452. Thus, in applying the Renton test for determining content-neutral status in this proceeding, we assume that cable operators have the same full First Amendment rights as newspapers.

wishing to express less favored or more controversial views.' " *Id.*

188. Like the former must carry rules (and the zoning regulation in *Renton*), the objective of the interim rules is unrelated to the enhancement or suppression of any particular opinion or viewpoints. The interim rules are designed solely to maintain the benefits of consumers' access to competitive video services during the transition period for the purpose of maximizing diversity of programming; they are not intended to prefer broadcast viewpoints over those of cable operators or programmers. Thus, the rules are not like the constitutionally infirm "right of reply statute" struck down in *Miami Herald, supra*, in which the reply obligation discriminated on the basis of viewpoints because it was triggered by a particular category of newspaper speech and was awarded only to those who disagreed with the newspaper's views. *See also Pacific Gas, supra*, 106 S. Ct at 910.[151] Even though the interim rules might be seen as giving access to certain broadcasters, this access is not dependent upon the expression of particular viewpoints by the cable operator, nor is the carriage right based upon the viewpoints expressed in a particular broadcaster's programming. Thus, employing a *Renton* analysis, which would apply to newspapers as well as to cable, it appears that the interim must carry rules may properly be classified as content-neutral.

189. We believe that many of the First Amendment burdens singled out in *Quincy* as casting particular doubt on the must carry rules' content-neutral status go not to whether *O'Brien* is the appropriate test, but rather to whether the rules can be justified in light of the ancillary

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[151] In *Pacific Gas*, also decided after *Quincy*, a plurality of the Court struck down a utilities commission order that required a utility to include in its billing envelopes messages by a consumer organization. Four members of the Court agreed that the order burdened speech in the same manner as the right of reply statute in Tornillo.

burdens on speech that they impose. In any event, we have attempted to reduce or eliminate these burdens under the interim rules. Unlike the former rules, the interim must carry rules are configured to ensure that a cable system's capacity will not be saturated by mandatory signals, so that the effects on cable operators' editorial discretion and cable programmers' access to the public are no more severe than necessary and certainly less severe than under the former rules.[152] We have examined this issue solely by reference to the principles set forth by the existing Supreme Court precedents, most recently in the *Renton* case. We are satisfied that, under the existing precedent, the interim must carry rules are content-neutral for purposes of determining whether *O'Brien* is the appropriate standard.[153]

190. *Application of the O'Brien Standard.* As the Court of Appeals stated in *Quincy*, under an *O'Brien* analysis, a content-neutral regulation "will be sustained 'if it furthers an important or substantial government interest and . . . if the incidental restriction on alleged First Amend-

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[152] *See para. 197, infra.* In Renton, the Court observed that content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest "and do not unreasonably limit alternative avenues of communication." Id. at 4162. Although the Renton zoning ordinance significantly limited the locations in which adult theaters could be operated within the city, see dissenting opinion of Justice Brennan, the majority concluded that there was still a "reasonable opportunity" to own and operate an adult theater. Id. at 4163. Similarly, by limiting the number of stations that a cable system must carry, the interim regulations are designed to provide cable programmers a "reasonable opportunity" for carriage of their signals on cable systems.

[153] We recognize, of course, that to the extent the interim rules raise novel constitutional issues, a reviewing court may ultimately determine that some departure from past precedent is warranted. Any such extensions of the law, however, are more appropriately made by a reviewing court.

ment freedoms is no greater than is essential to the furtherance of that interest.' "[154]

191. As noted above, we have determined that the narrowly crafted mandatory carriage regulations that we are adopting today are necessary as interim measures to preserve the availability of the program choices to consumers, including broadcast signals, and to ensure that broadcasting has a fair opportunity to compete with cable until it can be assured that viewers have the knowledge and capability to receive off-the-air signals not carried on cable at Which time the interim mandatory carriage rules will no longer be required to assure competition. These objectives, in our view, constitute a sufficiently important interest to satisfy the first part of the *O'Brien* standard.

192. We recognize that the District of Columbia Circuit suggested in *Quincy* that the Commission failed to demonstrate that its former must carry rules furthered a substantial governmental interest. In this regard, the court stated that the mere invocation of a laudatory regulatory objective was not colorably sufficient to withstand consitutional scrutiny under the first part of the *O'Brien* standard[155] and emphasized that the government, under the *O'Brien* standard, bore a "heavy burden"[156] in demonstrating the importance of the regulatory interest. Applying this standard, the court found that the Commission had failed to satisfy, by empirical data, its affirmative obli-

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[154] *Quincy*, 768 F.2d at 1451, quoting O'Brien, 391 U.S. at 377 (ellipses in original). In establishing this standard, the Supreme Court, in addition to the material quoted above, specified that the governmental regulation must be "within the constitutional power of the Government" (O'Brien, 391 U.S. at 377) and that the governmental interest [be] . . . unrelated to the suppression of free expression." Id.

[155] Id. at 1454, 1457.

[156] *Id.* at 1454, 1457.

gation to obtain support for the assumptions underlying its analysis.[157]

193. As reflected by subsequent Supreme Court case law, however, we believe that the court in *Quincy* required a more vigorous documentation of the substantiality of the governmental interest than is necessary under the first part of the *O'Brien* standard. In *Renton*, the Supreme Court concluded that a zoning ordinance involving adult theaters furthered the substantial governmental purpose of preserving the quality of urban life despite the absence of any specific studies demonstrating that regulatory intervention was needed to vindicate the city's asserted interest in enacting the ordinance.[158] As long as the governmental entity relies upon evidence that it reasonably believes is relevant, the Court determined that new studies supporting the governmental action were not necessary. The Court thus expressed its willingness to accept the interest identified by the governmental entity as substantial as long as that entity reasonably believes that the evidence supporting that interest bears some relation to the problem that the regulation is designed to correct.

194. Irrespective of whether or not the court in *Quincy* applied a proper burden of proof, however, we believe that the need for rules, including temporary provisions requiring the carriage of off-air television broadcast stations, in order to foster the governmental interest in maximizing

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[157] Id. at 11457.

[158] The Supreme Court reversed the lower court, inter alia, for failing to provide sufficient deference to the articulated governmental interest. The Court noted that the Court of Appeals had found the "city's justifications for the ordinance" to be "conclusory and speculative" on the grounds that "the Renton ordinance was enacted without the benefit of studies specifically relating to 'the particular problems or needs of Renton.' " The Court concluded that this reasoning "imposed on the city an unnecessarily rigid burden of proof." Renton, 106 S.Ct. at 930, quoting Renton v. Playtime Theatres, Inc., 748 F.2d 527, 537 (9th Cir. 1984).

diversity of program choices and in fostering competition among program sources constitutes a substantial and compelling government interest. In this regard, we have conducted a thorough and searching inquiry regarding whether or not the imposition of regulations governing signal carriage of cable systems is necessary to further our responsibilities under the Communications Act. We have carefully considered the comments of record and concluded, at this time, that the regulations adopted herein are in fact necessary to avoid potentially adverse effects on the range of program alternatives available to the public.[159] We believe that the evidentiary basis for this conclusion — which is set forth in the Need for Regulation section, above — amply satisfies the requirements specified under the first part of the *O'Brien* standard.[160]

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[159] As discussed above, *infra*, existing empirical data concerning the actual effects of deletion of the must carry rules on signal carriage is sparse. Moreover, given the rapidly evolving nature of the cable industry and changing competitive incentives resulting from the continuing development of satellite programming services carried by cable systems and other factors, *see* para. 39 *supra*, it is not clear that timely empirical studies could be carried out that would provide an accurate forecast of the effects of deleting the rules. The evidence does demonstrate, however, that a substantial number of cable subscribers have not maintained independent access to off-the-air reception and, therefore, would not currently be able to view stations if they were dropped by cable systems. Given the substantial federal interests at stake and the potential for cable systems to delete competitive broadcast services, we find that the record justifies continuance of must carry obligations as a transitional measure.

[160] As noted above, with the exception for noncommercial broadcast stations, the rule which we adopt today exempts cable systems with less than 20 activated channels from the mandatory carriage requirement. Because small cable systems have fewer channels upon which to disseminate information, we believe that even a limited mandatory carriage requirement for commercial stations would have a significant impact upon these systems' ability to choose programming for their subscribers. This exemption, therefore, reflects our view that although our interest in preserving the programming choices afforded by local

195. Under the second part of the *O'Brien* standard, a governmental agency is accorded a substantial degree of discretion in the manner in which it effectuates a regulatory purpose.[161] In this regard, the Supreme Court has stated that:

[R]egulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is not greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes

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broadcasting is substantial, it must be balanced against the similarly substantial First Amendment rights of cable. We have concluded that the former must give way to the latter where cable has 20 or fewer channels. We note that the Supreme Court, in applying the O'Brien standard, recently stated that:

> [T]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests.

United States v. Albertini (Albertini), 105 S.Ct. 2897, 2907 (1985).

[161] *Clark v. Community for Creative Non-Violence (Clark)*, 468 U.S. 288 (1984); *Albertini, supra*. In *Clark*, the Supreme Court upheld the constitutionality of a regulation prohibiting camping in Lafayette Park against the contention That the regulation violated the First Amendment rights of demonstrators protesting the plight of the homeless. The Court rejected the argument that the regulation was over broad because the Park Service, short of an absolute prohibition on sleeping, could have adequately protected park lands by limiting the size, duration or frequency of the demonstration. In finding that the regulation comported with the least restrictive means criterion, the Court stated that the amount of protection which the parks require is a matter of dispute and that O'Brien:

> [does not] assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Clark, 468 U.S. 299 (footnote omitted). *See generally Renton, 106 S.Ct. at 931.*

a substantial government interest that would be achieved less effectively absent the regulation.[162]

While the court, in *Quincy*, recognized that "its duty to police the First Amendment's requirement that intrusive governmental action be corrected does not imply the authority to 'finetune' administrative regulation,"[163] and that "[a]n agency typically has broad discretion over the manner in which it endeavors to effect its public interest objectives,[164] it nonetheless found that the prior must carry rules were not sufficiently narrows in scope to justify their substantial infringement on the constitutional rights of cable operators. Indeed, characterizing the must carry rules as "fatally overbroad," The court stated that "it is difficult to imagine a less discriminating or more overinclusive means of furthering the Commission's stated objectives."[165]

196. Unlike the former mandatory carriage rules invalidated in *Quincy*, we believe that the interim rules adopted in this proceeding are narrowly tailored to further our stated objectives. Indeed, with respect to overbreadth, our new mandatory carriage rules are different in several critical respects from the rules struck down in *Quincy*. For example, in *Quincy* the court stated that the Commission's former mandatory carriage rules: apply with equal force regardless of the degree of intrusion on First Amendment freedoms. They draw no distinction between cable systems that carry 100 signals and those that carry 12. Nor do they distinguish between systems that are saturated with must carry signals and those that are not.[166]

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[162] *Albertini*, 105 S.Ct. at 2907 (citations omitted).

[163] *Quincy*, 768 F.2d at 1459, *quoting White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1519 (D.C. Cir. 1984).

[164] *Id.*

[165] I d. at 1459.

[166] Id. at 1462, n.55.

By generally exempting cable systems with 20 or less activated channels and by providing for absolute limitations on the number of stations that a cable system must carry, however, which are scaled to the number of activated channels, our new rules guarantee that a significant amount of the programming capacity of cable operators will not be subject to mandatory carriage requirements. In this regard, the new regulations remedy infirmities in the prior must carry rules that the appellate court found to be "[e]specially troubling."[167]

197. The court in *Quincy* also criticized the former mandatory carriage rules for "indiscriminately protect[ing] each and every broadcaster . . . irrespective of the number of local outlets already carried by the cable operator."[168] The rules we adopt today do not contain that deficiency. The rights of a "qualified" local broadcast station to carriage depend upon the number of other "qualified" stations in the community as well as the channel capacity of the cable operator. Accordingly, we believe that these rules fulfill our vital objective of maximizing program choices for viewers by providing limited, transitional protection to the over-the-air broadcasting system, yet do so in a manner which is least restrictive of the editorial discretion of cable operators.

198. Certain parties to this proceeding in effect contend that any rules that fail to provide protection for stations in financial need, such as struggling UHF stations, are not sufficiently tailored. These parties essentially argue that a failure to adopt rules that specifically aid stations they perceive to be "deserving" renders those rules constitutionally infirm. We disagree. Our objective in adopting these rules is neither to penalize nor to benefit any particular station. Rather, our objective is to temper, during

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[167] Id.

[168] Id. at 1460.

an interim period, potential threats to the program Source diversity provided by the system of "broadcasting." This goal is critically distinct from any asserted-interest, which we do not espouse, in protecting the service of particular "local broadcasters."[169] We have provided for an initial Twelve-month period in which new stations, regardless of viewership, will be eligible for must carry status. This should afford new facilities an opportunity to establish a marketplace position before becoming subject to the viewing standards in the new rules. We believe this approach is necessary to adequately protect the "entry" mechanism of the broadcasting system. Beyond this "new" station exception, however, we believe that the use of a viewership test as a qualification for mandatory carriage of commercial stations properly balances our interest in the continued availability of programming alternatives offered by the traditional, free broadcast television system and our interest in according the broadest possible editorial discretion to cable operators.[170]

199. Finally, with respect to appropriate tailoring of our new regulations, it is critical to note that we have restricted them both in scope *and* in duration. While we believe that our interim mandatory carriage rules are sufficiently narrowly tailored to satisfy *O'Brien*, we recognize

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[169] Id. at 1460 (emphasis in original).

[170] We note that the court, in *Quincy*, criticized the former must carry rules for providing "indiscriminate protection [for] every broadcaster regardless of whether or to what degree the affected cable system poses a threat to its economic well-being." Id. at 1461. As noted above, however, the new rules do not accord blanket protection for all local stations and the economic effect of the rules on any individual station is not our primary concern. On the contrary, a requirement that failing stations be carried might be inimical to the public interest, in that we might well be requiring cable systems to carry broadcast stations the public did not want to watch, thereby preventing the cable system from offering a program service the viewers preferred. This would run directly counter to the *Quincy* court's concern that our former must carry rules were unresponsive to consumer preference.

that any such rules nevertheless restrict cable's editorial discretion. Accordingly, we have designed these rules so that they will continue no longer than necessary and we have paired them with ongoing requirements relating to input selector switches and consumer education so that we can rely on the latter rather than the former as soon as possible. The mandatory carriage requirements imposed here will automatically terminate in five years and are specifically designed to facilitate a transition to an unregulated environment where free and open compensation in the marketplace of ideas will govern the success or failure of programming, whether it is delivered by cable or by broadcast television.

200. In conclusion, we believe that the rules which we adopt today satisfy the requirements of the First Amendment. These rules narrowly further the important governmental interest in maximizing program choices and preserving competition in video services, yet they are limited in both scope and duration to maximize the ability of cable to achieve full participation in the information services marketplace by preserving (under the compulsory licensing system) the ability of cable operators to freely exercise their editorial discretion and to thereby respond to their viewers needs.

Other Statutory and Constitutional Concerns

201. Several commenters opposed to must carry requirements argue that the Commission is prohibited from adopting new rules by Section 624 of the Cable Act[171] and Section 326 of the Communications Act.[172] Also, some opponents assert that must carry rules constitute a taking in violation of the Fifth Amendment.

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[171] 47 U.S.C. § 544.

[172] 47 U.S.C. § 326.

202. *Comments.* Several cable parties argue that Section 624 of the Cable Act prohibits the Commission from reimposing mandatory carriage obligations on the part of cable operators. The 19 Cable Operators contend that Section 264 demonstrates a strong recognition by Congress of the First Amendment rights of cable operators consistent with the findings of the *Quincy* court. American Television and Communications Corporation (ATC) states that a central theme of the Cable Act generally, and Section 624 in particular, is to increase cable operators editorial discretion and to limit the ability of federal, state and local governments to influence cable programming content. In this regard, it claims that Section 624(b) prohibits the government from dictating the programming provided over a cable system.[173] ATC cites the House Report as underscoring the point that "[a] franchising authority is not permitted to establish particular service requirements which involve the provision of specific information to subscribers."[174]

203. ATC, 89 Cable Operators filing joint comments (89 Cable Commenters) and others state that the provisions of Section 624(f)(1) and (2) of the Cable Act bar the Commission from adopting new rules.[175] They argue that since the must carry rules were declared unconstitutional, they

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[173] Section 624(b) of the Cable Act provides, in part; "In the case of any franchise granted after the affective date of this title, the franchising authority, to the extent related to the establishment or operation of a cable system—(1) in its request for proposals for a franchise . . . may not establish requirements for video programming or other information services."

[174] H.R. Rep. 934, 98th Cong., 2d Sess. 69 (1984).

[175] Section 624(f)(1) provides that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title." Section 624(f)(2) provides that paragraph (1) shall not apply to any Commission rule either in effect on September 21, 1983, or amended after such date if the amendment is not inconsistent with the express provisions of the Cable Act.

no longer exist and, therefore, there are no rules that can be amended. They conclude that the Commission cannot either retain or amend the rules that the Commission thus is placed in "statutory stalemate."

204. The 89 Cable Commenters and the North Carolina CATV Association also argue that the anti-censorship provision in Section 326 of the Communications Act prohibits any must carry regulations.[176] They argue that such rules "interfere With the guaranteed rights of the cable operator and its subscribers to receive, free of governmental supervision or pressure, available, lawful communications of their choice."

205. ATC further contends that any must carry rule that confers an absolute right on a broadcast licensee to occupy some portion of a cable operator's channel capacity, thereby denying the operator use of that channel for other purposes, constitutes a governmental taking of property without just compensation. In this regard, ATC argues that musty carry rules provide uninvited access to private cable property by local broadcast stations and require permanent use in violation of The Fifth Amendment.[177]

206. *Evaluation.* We are unpersuaded that either the Cable Act, the Communications Act, or the Fifth Amendment prohibit the Commission from adopting new interim must carry rules. Turning first to the Cable Act, we believe that Congress was cognizant of the need to maximize program choices and to maintain an open, competitive market for television services in formulating legislation that would afford cable operators broad discretion over the con-

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[176] Section 326 of the Communications Act withholds from the Commission "the power of censorship over the radio communications or signals transmitted by any radio stations" and prohibits it from promulgating any "regulation or condition which shall interfere with the right of free speech." 47 U.S.C. Section 326.

[177] *Loretto v. Teleprompter Manhattan CATV Corp. (Loretto),* 458 U.S. 419, 441 (1982).

tent of their program services. Congress' recognition that an unbridled cable industry might destructively unbalance the nation's television system is evinced in The legislative history describing the need for the Cable Act. The legislative history states that "in adopting this legislation, the Committee is concerned that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming."[178] It is against this backdrop that Congress adopted Section 264 of the Cable Act.

207. With respect to ATC's assertion concerning Section 624(b) of the Cable Act, we observe that this provision only applies to franchising authorities. Inasmuch as the Commission is not a franchising authority, we conclude that Section 624(b)l does not affect the Commission's authority to adopt interim must carry rules.

208. Section 624(f) melds together Congress' concerns for cable operators' editorial discretion and a competitive balance among providers of video programming. On the one hand, Congress limited the Commission's authority to affect the provision or content of cable services and, on the other hand, it lent its approval to such regulations by grandfathering those rules in place on September 21, 1983, and authorizing their subsequent amendment. in this regard, the only Commission regulations explicitly referred to in the House Report on the Cable Act are the former must carry rules. The House Report states that "[r]egulations which relate to the content of cable service and which remain in effect include the FCC's must-carry requirements."[179]

209. We believe that this specific reference by Congress To the must carry rules and provision for their amendment by the Commission is an expression of Congress' intention that the Commission continue to have the authority to

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[178] H.R. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984).

[179] House Report, *supra* at 70.

regulate to maximize viewers' program choices and to promote a competitive environment for video services. Whereas Congress did not contemplate the court finding the must carry rules unconstitutional, we do not read the Cable Act as codifying the must carry rules or precluding their amendment.

210. We next address the jurisdictional issue raised in connection with the anti-censorship provision of Section 326 of the Communications Act. We believe that this provision also is not a statutory impediment to interim must carry rules. One of the primary thrusts of this proceeding is that regulations affecting cable television must be reconciled with free speech considerations. In this respect, in Section 326 of the Communications Act, Congress made clear its expectation that our regulations would be consistent with the First Amendment. As discussed herein, we believe that the rules we are adopting are consistent with the First Amendment under an *O'Brien* analysis and, therefore, we conclude that they do not transgress Section 326 of the Communications Act.

211. Finally, we find that the concerns raised in connection with the fifth Amendment do not present a constitutional bar to the rules we are adopting. We believe that must carry rules are not a "taking" against private property for public use without compensation. In this regard, the relevant constitutional test applicable in cases involving regulations under the Communications Act was articulated long ago and is still valid today:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right of compensation, on account of such injury does not attach under the Constitution. When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of

property without compensation is alleged, the test is whether restrictive measures are reasonably adapted to secure the purposes and objects of regulation. If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not unconstitutional taking of property without compensation or without due process of law."[180] As established above, we believe that the transitional must carry rules are reasonably related to our federal objectives with respect to television service and further believe they do not prevent a reasonable use of the property.[181] We conclude, therefore, that these rules do not result in an unconstitutional taking of property.[182]

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[180] *Trinity Methodist Church South v. Federal Radio Commission*, 62 F.2d 850, 853 (D.C. Cir. 1932) (citations omitted). See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-123, (1978), which also concludes that regulation of use of private property which impairs its value is not a taking if it serves a substantial public purpose and does not prevent a reasonable use of the property.

[181] Here, it is clear that our interim rules permit reasonable use of cable facilities, *see* discussion *supra* at paras. 197-201; moreover, given the long history of federal and state regulation of cable since the service's inception, the interim rules plainly do not have a significant impact on investor expectations. See Penn Central, Supra, at 124-25. *Loretto, supra*, is not to the contrary. The case involved a permanent, physical occupation of property, a factor that is not present here. The Loretto Court also clearly distinguished those cases in Which there was merely a restraint on the owner's use of property requiring an ad hoc analysis, as in *Penn Central, supra*, to determine if there is a compensable taking. *See also MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2566 (1986), reiterating that the Court has no "set formula to determine where regulation ends and taking begins." (Citation omitted.)

[182] The only federal appeals court to directly confront the Fifth Amendment issue presented by must carry rules stated that because the rules are reasonably related to the objectives of the Communications Act, they do not constitute a taking in violation of the Fifth Amend-

OTHER REGULATORY FACTORS AFFECTING TELEVISION MARKETS

212. In determining the need for regulation in this proceeding, we found that the former must carry rules contributed to the creation of a misperception on the part of cable subscribers which needs to be corrected before market mechanisms can be relied upon to achieve maximum diversity for the public. At this juncture, we also observe that there appears to be a number of factors and policies outside the scope of this proceeding that also create disequilibria in the competitive marketplace that may adversely affect viewers' access to program choices. First and foremost among these is the cable television industry's exemption from negotiating in the market for copyrighted broadcast program material, an exemption provided by the compulsory copyright licensing system enacted ten years ago. The effects of this exemption were magnified by the subsequent repeal of the syndicated exclusivity rules in 1979. Moreover, the Commission's prohibition against local telephone companies' ownership of cable television systems, and the exclusivity provisions in many local franchising agreements, have further insulated cable systems from some types of actual or potential competition.

213. The enactment of the compulsory copyright law, the repeal of the syndicated exclusivity rules, the federal prohibition on cable-telephone company cross-ownership, and the nonfederal restrictions on intramodal competition were undertaken in the interests of what were then perceived to be policies overriding whatever distortions in the market happened to have been created by these actions. Given the progressive maturation of the cable industry and the tensions created by the development of the video distribution market during the last several years, we believe

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ment. See Black Hills Video Corporation v. FCC, supra. See also Quincy at 1447, n.27, wherein the court declined to address the petitioner's Fifth Amendment contentions.).

it appropriate to reassess whether, in light of current conditions, these measures continue on balance to truly maximize consumer choice in programming options or to otherwise serve our public interest objectives. Our action today is supportable in its own right based on the evidenced adduced in the record, independent of any examination of these matters or conclusions reached thereon. We believe it appropriate, however, to conduct a larger independent evaluation of the cable industry. Therefore, we have directed the staff to take the following actions:

*With respect to the question of exclusive franchises for cable systems, the Office of General Counsel will participate in the remand proceedings ordered in the Supreme Court's decision in *City of Los Angeles and Department of Water and Power v. Preferred Communications, Inc.*[183] and in any other case(s) raising the issue of whether exclusive cable television franchises comport with the First Amendment;

*The Mass Media Bureau and the Office of Plans and Policy will prepare inquiries to study the effects of the compulsory copyright licensing scheme, the absence of syndicated program exclusivity, and the effect of the network program exclusivity rules on maximizing consumer choice in the programming options available on cable television and broadcast television. The results of these inquiries will be used by the Commission as the bases for possible rule making and/or legislative proposals, as appropriate.

*The Common Carrier Bureau will prepare a Notice of Inquiry to obtain information on the question of the restriction on cable ownership placed on local exchange telephone companies, to develop possible legislative proposals, if appropriate.

214. In addition, we are recommending that Congress begin its own review of those aspects of the television

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[183] 106 S. Ct. 2034 (1986).

market structure that pose impediments to a fully competitive environment for program services. IOn particular, we urge that Congress examine the efficacy of the compulsory copyright licensing system in light of the comments of the Department of Justice, the National Telecommunications and Information Administration, and others ion this proceeding. We intend to transmit to the Congress upon its completion the report of the Commission on the benefits and drawbacks of retaining the current compulsory licensing system for purposes of possible amendatory legislation, and we are prepared to work with the Congress in the interim on this matter should our participation be so requested.

PROCEDURAL MATTERS

215. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. *Need for and purpose of the rules.*

The Commission's mandatory signal carriage requirements were ruled constitutionally invalid in *Quincy Cable TV, Inc. v. FCC.* After examination of the record, the Commission determined that the most appropriate course of action in this matter is to adopt a regulatory program that will provide an orderly transition from the current situation where there is need for must carry regulation to its long term objective of developing an environment in which consumers will be able effectively to choose between cable and broadcast television program services. The first part of this two part program services. The first part of this two part program requires cable systems to offer their subscribers input selector switches that enables use of an antenna in conjunction with cable service and to implement a consumer education program To inform subscribers that it may be necessary to have off-the-air reception capability to receive all of the available broadcast signals. These requirements are intended to eliminate, over time, the cur-

rent perceived capability of cable systems to limit their subscribers' access to over-the-air broadcast stations. The second part of this program consists of interim must carry rules that will expire at the end of five years. These rules that will expire at the end of five years. These rules will provide for an orderly transition to a market environment where must carry regulations are no longer necessary. During the transition period, the input selector switch requirement and consumer education program will work to gradually supplant must carry rules and assure subscribers' access To local television broadcast stations.

II. *Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.*

A. *Issues Raised.* No commencing parties raised issues specifically in response to the initial regulatory flexibility analysis. However, several parties objected to imposing new must carry rules specifically on small cable systems, and other parties representing small broadcast stations supported the need for such rules. We believe that the interim must carry rules we are adopting impose a minimal burden on both large and small cable systems. We believe that our new requirements are particularly sensitive to the needs of small cable systems in serving their subscribers by not requiring systems with fewer than 20 channels to carry any stations other than one noncommercial educational station. The new rules will also not impose a significant burden on cable systems because they condition carriage on a system's usable channel capacity, thus ensuring that small cable systems are not overly burdened by must carry requirements. At the same time, these interim requirements will ensure that cable subscribers are not suddenly deprived of signals, particularly those of noncommercial educational stations. Likewise, we believe that the new rules consider the needs of small commercial and noncommercial stations by not requiring noncommercial

stations or stations that have been operational less than 12 months to meet the viewing standard criteria to qualify for carriage.

The input selector switch requirements and consumer education program will impose some cost burdens on all cable systems. The cost of supplying and installing the switch for new subscribers and of making the switch available to existing subscribers who choose to have it will be absorbed by cable systems. However, the switch is a low-cost item on a wholesale basis, and we anticipate that manufacturers will supply the switch to cable operators at volume discounts. In addition, installation costs will be minimal, since the switch will be installed at the same time that cable service is installed for new subscribers. Furthermore, the on-going nature of our requirements will spread the cost to the operator over an indefinite time period. We also believe that the cable operator will derive some benefits in the marketing of cable service by offering the switch to new subscribers. While we recognize that these requirements impose burdens on cable operators, we believe they are necessary and justified in light of the importance of our federal objectives.

We also recognize that the consumer education program will impose some burden on cable systems. However, we expect that cable operators will be able to consolidate these requirements with other system functions such as regular mailings. In fact, the consumer education program may benefit cable systems by providing a new opportunity for communication with subscribers. In addition, switch manufacturers may help reduce cable operators' burden by supplying them will switch installation instructions appropriate for use by consumers.

B. *Assessment.* As stated in our initial regulatory flexibility analysis, we anticipate that the interim mandatory carriage requirements will have significantly less impact than our previous must carry requirements. While the in-

put selector switch requirements will impose new burdens on cable operators, we believe they are necessary to the achievement of our federal objectives.

C. *Changes made as a result of comments.* While no parties filed comments concerning the initial regulatory flexibility analysis, many parties suggested alternative regulatory policies in the general comments. Our final decision in this matter reflects our consideration of these proposals and the effect of our policies on small business entities in both the broadcast and cable industries.

III. *Significant alternatives considered and rejected.*

We have considered all the alternatives presented in the *Notice* and those presented in the record in this proceeding. After full consideration of all of the issues raised throughout the course of this proceeding, we have adopted rules that we believe are the most reasonably fashioned in light of the facts and issues presented.

216. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens on the public. Implementation of these new/modified requirements and burdens will be subject to approval by the Office of Management and Budget as prescribed by the Act.

217. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§601 *et seq.*, (1981)).

218. Accordingly, IT IS ORDERED THAT under the authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules and Regulations IS AMENDED as set forth in the attached Appendix B, subject to approval by the

Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980. These rules and regulations ARE EFFECTIVE January 15, 1987.

219. IT IS FURTHER ORDERED, THAT good cause not having been shown, the "Emergency Motion to Terminate Proceeding or, Alternatively, to Defer Action," filed August 4, 1986 by Cole, Raywid & Braverman IS DENIED.

221. IT IS FURTHER ORDERED, THAT this proceeding and those in Docket Nos. 21323, 81-741, and 84-168 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico

Secretary

APPENDIX A

List of Commenters
Initial Comments

1. WLIG-TV, Inc.

2. Providence Journal Company

3. Ponderosa Television Inc.

4. USA Network

5. Meridian Communications Corporation

6. Centel Cable Television

7. Joint Comments of 89 Cable System Operators

8. Community Antenna Television Association, Inc.

9. Family TV Associates

10. Community TV Corp., Hudson Cablevision Corp., Lakes Cablevision Corp.,

Milford Cablevision Corp., and Souhegan Cablevision Corp.

11. Press Broadcasting Company

12. Grace Cathedral, Incorporated

13. Maryland-District of Columbia-Delaware Broadcasters Association, Inc.

14. Connecticut Cable Television Association, Inc.

15. National Cable Satellite Corporation—C-SPAN

16. Spanish International Communications Corporation, Bahia de San

Francisco Television Company, The Seven Hills Television Company

17. New Jersey Public Broadcasting Authority

18. Donrey Media Group

19. Eternal Word Television Network, Catholic Cable Network

20. United Television, Inc.

21. National Telecommunications and Information Administration

22. New York State Commission on Cable Television

23. Channel 66 Associates Limited Partnership

24. National Association of State Cable Agencies

25. Financial News Network Inc.

26. United States Department of Justice

27. North Carolina Association of Broadcasters

28. ABC Television Affiliates Association

29. Taft Broadcasting Company

30. National Telephone Cooperative Association

31. Tele-Communications, Inc.

32. Association of National Advertisers, Inc.

33. Office of Communication of the United Church of Christ, Henry Geller

and Donna Lampert

34. National Association of Broadcasters

35. Western Communications Inc. and Gill Industries

36. Pennsylvania Pay Television, Inc.

37. TVX Broadcast Group, Inc.

38. Cape Video Network, Limited Partnership

39. State Public Broadcasting Networks of Alabama, Alaska, Connecticut,

Georgia, Iowa, Kentucky, Louisiana, Maryland, Mississippi, New Hampshire,

New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Virgin

Islands, West Virginia, and Wisconsin

40. Maranatha Broadcasting Company, Inc.

41. Fleischman and Walsh on behalf of Adelphia Communications Corporation, Arizona Cable Television Association, Bucks County Cablevision, Coaxial Communications, The Essex Companies, Falcon Cablevision, Hauser Communications, Inc., Helicon Corporation, Maine Cable Company, McCaw Communications Companies, Inc., Mid-America Cable Television Association, Pennsylvania Cable Television Association, Sunbelt Cable, Ltd., Tele-Media Corporation, Tidel Communications Inc., Vision Cable Communications, Inc., Whitcom Investment Company, Whitney & Company, Inc., and W.W. Communications, Inc. (Nineteen Cable Operators)

42. Richard S. Leghorn

43. National Cable Television Association, Inc.

44. Association of Independent Television Stations, Inc.

45. Buffalo Broadcasting Company, Inc.

46. American Television and Communications Corporation

47. Black Entertainment Television

48. CBS Inc.

49. Station Representatives Association, Inc.

50. Corporation for Public Broadcasting, the National Association of Public

Television Stations, and the Public Broadcasting Service

51. Heritage Communications, Inc.

52. Astroline Communications Company Limited Partnership, Four Star

Broadcasting, Inc., Amistad Communications of the Southwest, Kyles

Broadcasting Ltd., Mandeville Communications Company of New Orleans

and Tampa Bay Broadcasting, Ltd.

53. The City of New York Municipal Broadcasting System

54. The City of Boston

55. American Cable Publishers Institute, Inc.

56. Howard University, The National Association of Black-Owned Broadcasters, The National Bar Association and the National Conference of Black Lawyers Communications Task Force

57. City of New York

58. Alaska Broadcasters Association, Bonneville International Corporation KIRO, Inc., Maine Radio and Television Company, WLBZ TV, Inc., Quincy Broadcasting Company, KTTC Television, Inc., WVVA Television, Inc., and WSJV Television, Inc.

59. Grant Broadcasting System, Inc.

60. Smaller Market UHF Television Stations Group

61. KWTX Broadcasting Co., Inc., Texoma Broadcasters, Inc., Brazos Broadcasters, Inc.

62. California Cable Television Association

63. Television Operators Caucus, Inc.

64. National Broadcasting Company, Inc.

65. Turner Broadcasting System, Inc.

66. Cosmos Broadcasting Corporation and WPNI Television Company, Inc.

67. Telepictures Corporation

68. Tulsa 23

69. United States Catholic Conference

70. Tribune Broadcasting Company

71. Gateway Communications, Inc.

72. The Association of Maximum Service Telecasters

73. North Carolina CATV Association

74. Seattle Television Limited Partnership

75. Association of Program Distributors

76. Studioline Cable Stereo Network/Studioline Corporation of America

77. KMSS-TV, Shreveport, Louisiana

78. Malrite Communications Group, Inc.

79. Motion Picture Association of America, Inc.

80. NATPE International

81. ATV Broadcast Consulting Inc.

82. Gray L. Christensen

83. Lincoln Broadcasting Company

84. Broadcast-Cable Associates

85. KQTV Television

86. W-TWO Television Center

Reply Comments

1. National Coalition For Minority Broadcasting

2. Heritage Communications, Inc.

3. Gray L. Christensen

4. Bureaus of Competition, Economics and Consumer Protection of the Federal Trade Commission

5. Richard S. Leghorn

6. American Communications and Television, Inc.

7. ABC Television Affiliates Association

8. Corporation For Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service

9. Summit Radio Corporation

10. Astroline Communications Company Limited Partnership, Four Star Broadcasting, Inc., Amistad Communications of the Southwest, Kyles Broadcasting, Ltd., Mandeville Communications Company of New Orleans and Tampa Bay Broadcasting, Ltd.

11. Financial News Network Inc.

12. New Jersey Public Broadcasting Authority

13. California Broadcasting Association

14. William B. Smullin

15. Joint Reply Comments of 89 Cable System Operators

16. Donrey Media Group

17. Great Trails Broadcasting Corp.

18. Bloomington Comco, Inc. and Gerald J. Robinson

19. Spanish International Communications Corporation, Bahia De San Francisco Television Company and The Seven Hills Television Company

20. National Cable Television Association, Community Antenna Television Association, National Association of

Broadcasters, Television Operators Caucus and Association of Independent Television Stations, Inc.

21. American Television and Communications Corporation

22. Grace Cathedral, Incorporated

23. National Telephone Cooperative Association

24. Office of Communication of the United Church of Christ, Henry Geller and Donna Lampert

25. City of New York

26. National Black Media Coalition

27. Cablevision Systems Corporation

28. Western Communications Inc.

Comments on the Industry Agreement

1. Malrite Communications Group, Inc.

2. McGraw-Hill Broadcasting Co., Inc., The New York Times Co. and Desert Empire TV Corp.

3. Maryland Public Broadcasting Commission

4. Community Antenna Television Association

5. National Coalition for Minority Broadcasters

6. Maranatha Broadcasting Company, Inc.

7. City of New York

8. WBNS-TV, Inc. and Video Indiana Inc.

9. Sunshine Television Inc.

10. Carolina Christian Broadcasting, Inc.

11. WLIG-TV, Inc.

12. Fisher Broadcasting, Inc.

13. Montana Television Network

14. Providence Journal Company

15. WTZA-TV Associates

16. Meridian Communications Corporation

17. Corporation for Public Broadcasting, the National Association of Public Television Stations, and the Public Broadcasting Service

18. Jim Francis

19. Grace Cathedral, Incorporated

20. Howard University, The National Association of Black-Owned Broadcasters, The National Bar Association and The National Conference of Black Lawyers Communications Task Force

21. American Cable Publishers Institute, Inc.

22. Robert Schultz, President, VideoProbeIndex, Inc.

23. St. Charles CATV Inc. and Chasco Cablevision, Ltd.

24. KUTV, Inc. and Kansas State Network, Inc.

25. Duhamel Broadcasting Enterprises

26. Turner Broadcasting System, Inc.

27. Richard S. Leghorn

28. The Frontier Broadcasting Companies

29. Fargo Broadcasting Corp.

30. United States Department of Justice

31. Cablevision Systems Corporation

32. Summit Radio Corporation

33. Channel 17 Associates, Ltd.

34. National Association of Broadcasters

35. WNJU-TV Broadcasting Corporation

36. Gill Industries, Inc.

37. ABC Television Affiliates Association

38. Alison Greene, Loyola Law Review

39. United States Catholic Conference

40. National Cable Television Association, Inc.

41. Adelphia Communications Corporation, Arizona Cable Television Association, Bucks County Cablevision, Coaxial Communications, The Essex Companies, Falcon Cablevision, Hauser Communications, Inc., Helicon Corporation, Maine Cable Company, McCaw Communications Companies, Inc., Mid-America Cable Television Association, Pennsylvania Cable Television Association, Sunbelt Cable, Ltd., Tele-Media Corporation, Tidel Communications, Inc., Vision Cable Communications, Inc., Whitcom Investment Company, Whitney & Company, Inc., and W.W. Communications, Inc. (Nineteen Cable Operators)

42. Metropolitan Board of Education, Long Island Educational Television Council, Metropolitan Pittsburgh Public Broadcasting Inc., and Santa Clara Board of Education

43. National Independent Television Committee

44. Television Operators Caucus, Inc.

45. Canadian Broadcasting Corporation

46. Association of Independent Television Stations, Inc.

47. Allen Broadcasting Corporation

48. Capital Cities/ABC, Inc.

49. WFLI, Inc.

50. Bloomington Comco Inc. and Gerald J. Robinson

51. City of Boston

52. Tribune Broadcasting Company

53. CBS Inc.

54. NATPE International

55. Ohio Educational Broadcasting Network Commission

56. Motion Pictures Association of America, Inc.

57. Organization for the Protection and Advancement of Small Telephone Companies

58. Heritage Communications, Inc.

59. Grant Broadcasting System, Inc.

60. Spanish International Communications Corporation, Bahia de San Francisco Television Company, and The Seven Hills Television Company

61. National Telecommunications and Information Administration

62. California Cable Television Association

63. KTUH, Inc.

64. Ninety-Seven Television Stations

Appendix B

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, and 601.

2. Section 76.5 is amended by revising paragraphs (d) and (j) and adding new paragraphs (jj), (kk), (ll), and (mm) to read as follows:

§76.5 Definitions.

* * * * *

(d) *Qualified television station.* (1) Any television broadcast station, as defined in §76.5(b), that with respect to a particular cable system:

(i) Is licensed to a community whose reference point, as defined in §76.53, is within 50 miles of the principal headend of the cable system; and

(ii) If a commercial station, receives an average share of total viewing hours of at least 2 percent and a net weekly circulation of at least 5 percent, as defined in §76.5(k), in noncable households in the county served by the cable system or has been operational less than one full year. For purposes of this section, a station is considered operational as of the date it commences operation under program test authority. The viewing standards of this paragraph shall not apply for one full year from January 15, 1987 to otherwise qualified stations that commenced operation after July 19, 1985, but before January 15, 1987 (the effective date of these rules).

(2) Any noncommercial educational television station's translator with 100 watts or higher power serving the cable community.

* * * * *

(j) *Substantially duplicates.* Regularly duplicates the network programming of one or more stations in a week during the hours of 6 to 11 m., local time, for a total of 14 or more hours.

(jj) *Usable activated channels.* Channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use but excluding channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations. *See* Part 76, Subpart K.

(kk) *Principal headend.* The location of the cable system equipment used to process the signals of television broadcast stations for redistribution to subscribers. Where more than one location meets the above definition, the cable operator shall designate a single location as the principal headend.

(ll) *Television survey season.* The twelve-month period beginning April 1 of one year and ending March 31 of the following year.

(mm) *Input selector switch.* Any device that enables a viewer to select between cable service and off-the-air television signals. Such a device may be more sophisticated than a mere two-sided switch, may utilize other cable interface equipment, and may be built into consumer television receivers.

3. Section 76.7, Special Relief, is amended by removing paragraph (g) and redesignating paragraph (h) as paragraph (g).

4. Section 76.53 is amended by revising the first sentence to read as follows:

§76.53 Reference points.

The following list of reference points shall be used to determine whether a television station is "qualified" pursuant to §76.5(d) and to identify the boundaries of the major and smaller television markets (defined in §76.5).

* * * * *

5. Section 76.55 is amended to read as follows:

§76.55 Qualified television station; method to be followed for showings.

A commercial television station shall demonstrate that it meets the viewing standard specified in §76.5(d)(1)(ii) on the basis of an independent professional survey of noncable homes conducted according to the following provisions:

(a) If the station has been operational, as defined in §76.5(d)(1)(ii), for at least one complete television survey season, the survey shall cover four separate, consecutive four-week periods, including one in each of the four quarters of the survey season (i.e., April-June, July-September, October-December, January-March), and be conducted pursuant to the methodology used to compile Appendix B of the *Memorandum Opinion and Order on Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972).

(b) If the station has been operational, as defined in §76.5(d)(1)(ii), for less than one complete television survey season, the survey shall cover a single period of at least two weeks. The survey sample shall be proportionally distributed among the noncable homes in the county served by the cable system and shall be of sufficient size to assure

that the reported results are at least one standard error above the required viewing standard.

6. A new section 76.56 is added to read as follows:

§76.56 Mandatory carriage of television stations.

(a) A cable system shall carry the signals of qualified television stations in accordance with the following provisions:

Cable channels	TV signals	Cable channels	TV signals	Cable channels	TV signals
21 - 29	7	62 - 65	16	98 - 101	25
30 - 33	8	66 - 69	17	102 - 105	26
34 - 37	9	70 - 73	18	106 - 109	27
38 - 41	10	74 - 77	19	110 - 113	28
42 - 45	11	78 - 81	20	114 - 117	29
46 - 49	12	82 - 85	21	118 - 121	30
50 - 53	13	86 - 89	22	122 - 125	31
54 - 57	14	90 - 93	23	above 125	25 % of capacity
58 - 61	15	94 - 97	24		

(1) A cable system shall carry the signals of qualified noncommercial educational television stations or translators of such stations, as follows:

(i) A cable system with fewer than 54 usable activated channels shall carry the signal of one qualified noncommercial educational station or translator;

(ii) A cable system with 54 or more usable activated channels shall carry the signals of two qualified noncommercial educational stations or translators.

(2) A cable system with 21 or more usable activated channels shall carry the signals of qualified television stations as follows:

(b) Where the number of qualified television station signals exceeds the number that a cable system is required to carry pursuant to paragraph (a) of this section, the cable system may select which of the signals to carry, *except that* carriage of qualified noncommercial educational station signals pursuant to paragraph (a)(1) of this section is nondiscretionary.

(c) In complying with the provisions of this section, a cable system shall be permitted but shall not be required to carry the signal of any qualified television station that:

(1) Substantially duplicates the signal of another qualified television station affiliated with a particular commercial national network;

(2) Would result in payment by the cable system of distant signal copyright fees;

(3) Fails to deliver to the cable system principal headend a picture of high quality providing enjoyable viewing and in which interference is no greater than just perceptible.

Note: In general, a signal level of -45 dBm for UHF signals and -49 dBm for VHF signals at the input terminals of the signal processing equipment would be needed to provide a picture of the required quality. Alternatively, a baseband video signal could be supplied.

(d) A cable system shall not accept payment or other consideration in exchange for carriage of the signal of any qualified television station carried in fulfillment of mandatory signal carriage obligations, *except that* any such station may bear any costs associated with: (1) delivering a good quality signal, as defined in §76.56(c)(3), to the cable system; (2) meeting copyright obligations that are incurred as a consequence of such carriage.

(e) A cable system shall identify on request those stations carried in fulfillment of its must carry signal carriage obligations.

7. Section 76.57, Provisions for systems operating in communities located outside of all major and smaller television markets, is removed.

8. A new section 76.58 is added to read as follows:

§76.58 Disputes concerning carriage.

(a) Any qualified television station not being carried may demand carriage from a cable system.

(b) As a prerequisite to a Commission decision concerning a television station's right to carriage, such demand shall be made in writing and shall include showings that:

(1) The station is a "qualified television station" as defined in §76.5(d);

(2) The cable system on which carriage is sought has not satisfied its carriage obligations under §76.56;

(3) To the extent that the matter is in dispute, the station delivers a good quality signal to the principal headend of the cable system pursuant to §76.56(c)(3).

(c) A cable system receiving a demand for carriage pursuant to this section shall respond in writing to the television station requesting carriage within fifteen (15) days of receipt of such demand. If the system declines to carry the station, the system's response shall state the reasons under the rules for such refusal.

(d) If no carriage agreement is reached between the parties, a ruling on the matter may be requested from the Commission. Such request shall contain a copy of the carriage demand, the response thereto, and any other information that may be considered relevant to a resolution of the question.

Pleadings responsive to such request may be filed within twenty (20) days. Initial requests and pleadings relating thereto shall be served on all parties to the proceeding. All factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them. An original and two (2) copies of the request and subsequent pleading(s) shall be filed.

(e) No cable system that, in refusing a carriage request, has complied in good faith with the mandatory signal carriage requirements of this chapter shall be subject to any forfeiture or penalty if it is later determined that the requesting station is entitled to carriage. If the Commission determines that the signal in question was or is entitled to carriage, the system shall commence such carriage within a reasonable period, to be specified by the Commission, and shall continue such carriage for at least twelve months.

(f) A cable system may be assessed a forfeiture or other penalty for failure to comply with a Commission order to carry a qualified broadcast station. Such Commission orders include action by the Chief of the Mass Media Bureau under delegated authority.

9. Section 76.59, Provisions for smaller television markets, is removed.

10. A new section 76.60 is added to read as follows:

§76.60 Carriage of other television signals.

(a) In addition to the qualified television station(s) carried pursuant to §76.56, a cable system may carry the signals of any other television station, low power television station, or television translator.

(b) A cable system shall be permitted, but shall not be required, to carry any subscription television broadcast

program or any ancillary service transmission on the vertical blanking interval or the aural baseband of any television broadcast signal including, but not limited to, multichannel television sound and teletext.

11. Section 76.61, Provisions, for the major television markets, is removed.

12. A new Section 76.62 is added to read as follows:

§76.62 Manner of carriage.

(a) Where a qualified television broadcast signal is carried by a cable system in fulfillment of the mandatory signal obligations set forth in this part of the rules:

(1) the signal shall be carried in full, without deletion or alteration of any portion, except as required by this part;

(2) the signal shall be carried in its entirety, without material degradation, on the lowest-priced, separately available cable service tier. .

(b) Where a television broadcast signal otherwise is carried by a cable system pursuant to the rules in this part, programs broadcast shall be carried in full, without alteration or deletion of any portion, except as required by this part.

13. Section 76.64 is revised to read as follows:

§76.64 Expiration of mandatory carriage provisions.

The provisions of §§76.56, 76.58, and 76.60, and 76.62(b) shall remain in force until January 15, 1992, and shall thereafter be of no further force or effect.

14. Section 76.65, Determination of signal contours, is removed.

15. A new Section 76.66 is added to read as follows:

§76.66 Input selector switches.

(a) A cable system operator shall supply to each new subscriber and offer to supply to each existing subscriber an input selector switch for each separate television receiver to which cable service is provided by the cable operator. The operator shall comply with the following requirements in providing the switch and installing cable service:

(1) Supply and install the switch at no additional cost to new subscribers, unless the subscriber already has an input selector switching device or his/her television has such a device built-in;

(2) Offer to supply the switch to any person who is a subscriber on January 15, 1987, within six months of that date and thereafter on an annual basis until January 15, 1992, at no cost other than reasonable labor charges for installation, if necessary or requested, by providing the following form, in the same words or in other words that convey the same meaning, to all such persons who do not have input selector switches:

In accordance with FCC rules, we are offering to supply you with an input selector switch, at no cost, for each separate television receiver To which cable service is provided. This device, which connects both to the cable service and an antenna you supply, will enable you to select between cable service and off-the-air television signals. You may already have such switching capability, either in a separate device or as a built in feature to your television receiver. If you already have this capability you do not need an additional switch. However, if you do not have such switching capability, we will install a switch for a reasonable charge that reflects our actual labor costs or we will provide you a switch with written self-installation instructions at no charge. If you wish to obtain an input

selector switch, please check the appropriate box below and return this form to our business office.

[ ] I wish to have an input selector switch installed. I understand that I will be charged reasonable labor costs for this service.

[ ] I wish to receive an input selector switch with installation instructions at no additional charge.

Please contact [NAME OF CONTACT AT CABLE SYSTEM OFFICE] at [ADDRESS AND TELEPHONE NUMBER] for further information.

(3) Comply with the following requirements with respect to antennas:

(i) If an antenna is present, the operator shall not recommend that the antenna be removed;

(ii) If an antenna is not present, the operator shall inform the subscriber that the switch will be operational only if it is connected to an antenna, which The subscriber may purchase from an antenna supplier;

(iii) Where the operator installs a switch and an antenna is present, it shall connect the switch to that existing antenna.

(b) Input selector switches used for alternating between a cable system and an antenna for reception of television broadcast signals shall comply with the technical standards of §15.606(a) of the rules.

(c) The cable system operator shall provide the following information, in the same words or in other words that convey the same meaning, to each new subscriber at the time of installation of cable service and to existing subscribers that do not have input selector switches in writing within six months after January 15, 1987, and annually thereafter to all subscribers:

The FCC in 1986 adopted new requirements concerning cable system carriage of local television broadcast stations.

Under these regulations, a cable system will be required to carry one or more local broadcast stations, but not necessarily all such stations, until January 15, 1992. After that date, carriage of local broadcast stations will be at the discretion of the cable operator. As a result, at this time or at a later date, you may not be able to receive all local television stations over your cable system. To ensure that you will retain the capability of receiving all of the broadcast stations that are available off-the-air, Which might not be carried on the cable system, either now or in the future, it may be necessary to use an input selector switching device in conjunction with an antenna. This device, which connects both to your cable service and your antenna, will enable you to select between cable service and off-the-air television signals.

At this time, [NAME OF CABLE SYSTEM] is not carrying the following local broadcast stations: [LIST CALL LETTERS AND CHANNELS]

Questions related to input selector switches should be directed to [NAME OF CONTACT AT CABLE SYSTEM OFFICE] at [TELEPHONE NUMBER].

SEPARATE STATEMENT
OF
COMMISSIONER JAMES B. QUELLO

Re: Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Systems (MM Docket No. 85-349)

The must-carry rules adopted by the Commission on August 7, 1986, are the very minimum that I can support. I continue to believe that only comprehensive must-carry rules can guarantee full protection to our system of over-the-air television broadcasting and the government's legitimate interest, pursuant to Sections 1 and 307(b) of the Communications Act, in fostering a system accountable to the public interest. Cable, once installed, is a geographic bottleneck[1] with, unlike broadcasting, little or no program accountability to any public or government authority. As I have stated on many occasions, the Commission should have appealed the *Quincy* decision.[2] The court of appeals,

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[1] The Commission's *Order* emphasizes that cable is misperceived as a "gatekeeper" because the Commission's policies made it unnecessary for subscribers to maintain alternative means for receiving off-the-air broadcast signals. I disagree with this simplistic evaluation of cable's power. In my opinion, even assuming that the A/B switch is a workable device, cable's ability to pick and choose which off-the-air stations to offer subscribers carries with it the power to affect a station's viewership and revenues, if not survivability. This power cannot be reduced so easily to a single-minded notion of consumer misperception.

[2] I fully agree with one of the observations of a well-known columnist:

* * * *

. . . In one of the least appearing judicial pronouncements since a federal judge destroyed the phone company, a three-judge panel of the U.S. Court of Appeals decided in July to strike down the So-called "must-carry" rules affecting cablecasters. The rules required cable systems to offer their subscribers all available TV stations in their service area.

This sometimes did lead to duplication of program choices (if, for in-

in my opinion, went far beyond the scope of review invested in the judiciary and, left unreviewed, created uncertainty and conflict both over the appropriate First Amendment standard to be applied to cable,[3] as well as the appropriate standard to be used when reviewing an agency's exercise of its policy-making function.[4]

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stance, there were two ABC affiliates or two public TV stations on the same cable system), but it also helped keep the system and the service locally accountable.

The Cable Complications, The Washington Post, Sept. 4, 1985 (Tom Shales).

[3] Our *Order* discusses in detail the constitutional controversy surrounding cable operators' First Amendment rights. As the *Order* points out, the Supreme Court has not addressed the question of whether cable is entitled to First Amendment Protection akin to that enjoyed by newspapers. And in the courts of appeals there is a considerable diversity of viewpoints on this subject. I hope the day will soon be here when all participants in video communications will enjoy full First Amendment rights. That day, however, has not yet arrived. So long as cable voluntarily enters the video market and heavily uses off-the-air broadcast signals as part of its public offering, it thereby submits itself to a regulatory scheme established by Congress for broadcasting. In other words, I still believe that the only court to have addressed specifically the constitutionality of our must-carry rules (prior to *Quincy*) correctly concluded:

> The Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant to the Congressional power that the CATV systems do not themselves use the air waves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service. Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it. The public interest in preventing such a development is manifest.

Black Hills Video Corp. v FCC, 399 F.2d 65, 69 (8th Cir. 1968).

[4] The *Quincy* court, in faulting the Commission for having failed to develop an adequate factual basis to support its economic harm argument, imposed on this agency a standard of proof for rulemaking

Although still short of the mark, I voted to adopt the Commission's refashioned must-carry rule. It does seem to represent a sincere attempt to adopt a workable and reasonable compromise position. It provides carriage for the most popular stations as well as public broadcasting stations. And it takes into consideration the plight of newcomers. I still, however, find it necessary to issue this separate statement to express disagreement with some aspects of the *Report and Order* as well as to elaborate on

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that was, in my opinion, far in excess of that normally applied when a court reviews an agency performing its functions as a legislator. It is well recognized that in rulemaking "the factual component of The policy decision is not easily assessed in terms of an empirically verifiable condition," but rather involves issue in which "a month of experience will be worth a year of hearings." *Association of National Advertisers, Inc. v. FTC*, 627 F. 2d 1151, 1168 (1979) (quoting from *American Airlines, Inc. v. CAB*, 359 F.2d 624, 633 (D.C. Cir. 1966) (en banc)). See also *FCC v. National Citizens Committee*, 436 U.S. 1775, 813-14 (1978). Even if a stricter standard is to apply in cases where there are First Amendment implications requiring application of the *O'Brien* standard, the *Quincy* court appeared unwilling to give the Commission the benefit of any doubt. In another case, where the balancing of First Amendment rights were just as delicate and difficult as they were here, The Supreme court paid considerable attention to the agency's views:

> The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment. That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem. Thus, before confronting the specific legal issues in these cases, we turn to an examination of the legislative and administrative development of our broadcast system over the last half century.

CBS, Inc. v. DNC, 412 U.S. 94, 103 (1973). It seems to me that the court of appeals simply ignored the highest court's teachings, 106 S. Ct. 930, 931 (1986).

a substantial government interest that is not relied upon in our *Order* as well as to elaborate on a substantial government interest that is not relied upon in our *Order* as well as to elaborate on a substantial government interest that is not relied upon in our *Order* but which, in my view, is the single most significant reason why the new rules are, and the old rules were, constitutionally sound. I would also like to take this opportunity to state to state that if the plan we have adopted is not implemented in all significant respects, or whatever reason, I will be left with little choice but to urge that we reinstate our former must-carry rule, or, at a minimum, adopt a must-carry rule, without a sunset date, as urged in the industry compromise.

The most obvious shortcoming of our *Order* is that in justifying a must-carry rule, it does not rely on the substantial government interest in protecting the integrity of our Table of Assignments and ensuring public access to stations that have a statutory obligation to serve their local communities. In my view, both interests are substantial enough to justify a must-carry rule, without resort to any notion that broadcasters face economic ruin in the absence of as must-carry rule.

The Commission's *First Report and Order*, 38 F.C.C. 683 (1965) sought to protect all of the above interests. As we explained then:

> Persons unable to obtain CATV service, and those who cannot afford it or are unwilling to pay, are entirely dependent upon local or nearby stations for their television service.

The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis (Sections 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many peo-

ple and which, practically, will not be available to many others. *Id.* at 699.

* * * *

> Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible could we consider countenancing such a practice. *Id.* at 705.

That these are substantial government interests seems intuitive. While not easily susceptible to empirical proof, they are the types of policy decisions that independent agencies were specifically created to consider. See note 2, supra. And the Supreme Court apparently agreed with our justification for a must-carry rule when, in *Capital Cities Cable, Inc. v Crisp.* 104 S. Ct. 2694, 2708 (1984), it noted that our "comprehensive regulations . . . to govern signal carriage . . . reflect an important and substantial federal interest."

The record before us again contains strong support for the notion that maintaining the integrity of our general spectrum allocation scheme and our longstanding statutory obligation to promote localism justify a must-carry rule.[5]

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[5] See e.g. Comments of the *Association of Independent Television Stations, Inc.; Television Operators Caucus; Inc.; National Broadcasting Company; and National Association of Broadcasters.* See also Reply Comments of *National Cable Television Association* which, in justifying the industry proposed compromise, stated that the compromise tries to

That the Commission chose not to emphasize this substantial government interest justification is disheartening to say the least. I in no way mean to suggest that our principal rationale is not sufficient to support our rule. It should be more than adequate. On the other hand, we have consistently emphasized a licensee's local nonentertainment programming obligation in our radio and television deregulation orders. *Radio Deregulation*, 98 F.C.C.2d 968, 977 (1981); *TV Deregulation*, 98 F.C.C.2d 1076, 1091-92 (1984), reconsideration denied, F.C.C.2d (1986), appeal appending, *Action for Children's Television v FCC*, No. 86-1425 (D.C. Cir., filed July 23, 1986). This is an obligation which, in the past, we apparently regarded as arising from 307(b) of the Act. *Pinellas Broadcasting Company v. FCC*, 230 F.2d 204, 207, *cert denied*, 76 S. Ct. 650 (1956). And while the Commission may have subtly attempted to recast the obligation as solely within our discretion, the court of appeals went out of its way to note that the public interest standard imposes statutory nonentertainment programming obligations on licensees. *UCC v FCC*, 707 F.2d 1413, 1429, n. 46 (1983). Having made localism the cornerstone of our deregulatory policy, it simply makes no sense not to cite this as the most persuasive justification for adopting a must-carry rule. Our *Order* deserved much more than simply passing reference to this singularly most significant government interest.

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ensure "that there will continue to be available to the public a reasonable quantum of free television service." Reply comments at p. 3. But most trenchant is the comment of the Honorable John C. Danforth, Chairman, Committee on Commerce, Science and Transportation, in his letter to Chairman Mark S. Fowler on July 22, 1986, at page 4:

If the Commission acquiesces to circumstances that bestow gatekeeper status upon cable systems, this will conflict with three longstanding, substantial government interest—the public's First Amendment right of access to diverse sources of information, the preservation of vigorous competition among communications services, and the Commission's statutory obligation to promote as nationwide broadcasting service built upon local outlets.

I must also make some remark about our heavy reliance on the A/B switch. When I dissented from the Commission's refusal to appeal the *Quincy* decision, I expressed considerable skepticism that the A/B switch could realistically be relied upon to maintain access to off-the-air television in homes wired to a cable system. I re-emphasized that concern to my colleagues in July, pointing out that it was doubtful cable subscribers would maintain an antenna system solely to view the local stations a cable system chose not to carry. And commenters also voiced grave reservations about the utility of the A/B switch.[6] Nevertheless, I decided that a proposal requiring that the public be educated on the need for an A/B switch, coupled with a requirement that cable systems provide subscribers with an A/B switch, was worth trying. At a minimum, it has the potential of providing future empirical data on the marketplace feasibility of the switch. At the same time, it has been impossible not to take note of the criticism of our decision already reported by the press. While these views will not be considered by the Commission in issuing the *Order* it adopted on August 7, I want to forecast my intent to reconsider my vote should parties present persuasive arguments, on reconsideration, that the A/B switch, or something functionally equivalent, will not work. If an A/B switch will not work, then, until we can find an alternative means for ensuring the public's access to their local television stations, a permanent, comprehensive must-carry rule would be appropriate.

I want to make absolutely clear that I will use my best efforts to block any sunset of our must-carry rule should we have credible evidence that our program or assumptions underlying the program are in error. In addition, the comments we receive in response to the inquiries we will

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[6] See e.g., Comments of the *National Association of Broadcasters*, June 1986; Letter to Commissioner James H. Quello from Preston Padden, June 19, 1986.

initiate concerning the compulsory license scheme, telco entry, and syndicated and network program exclusivity, will be highly relevant to my decision whether to permit sunset of our rules. In 1984, I dissented to the Commission's refusal to initiate an NOI to examine changes in the marketplace since elimination of the syndicated program exclusivity rule. I believed then, as I do now, that this Commission must consider the effect of its actions in conjunction with Congress and the Copyright Royalty Tribunal. Our's is a broad, not narrows, mandate to regulate broadcasting, and we cannot fulfill that responsibility in a vacuum. *In the Matter of Cable Television Syndicated Program Exclusivity and Carriage of Sports Telecasts*, 56 RR 2d 625, 633 91984).[7]

As a last issue of major significance, I express considerable regret that I could not convince the Commission to do more for public broadcasting. Public broadcasting, although specially acknowledged in the Commission's plan, is certainly losing much of the coverage one might expect for a service chartered by Congress which continues significant funding. The diversity of views contemplated by Congress and supported through the years by this Commission can only be diminished under this plan which relegates to one video transmission pipeline a gatekeeping power over all video services that are licensed to serve the public interest in the area. While some may view elimination of must-carry requirements as a triumph of the marketplace, I view it as an unbalanced skewing of the marketplace to favor one participant over another. And, public broadcasting—created specifically to stand outside of the marketplace and offer alternative educational and

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[7] I disagree with the *Quincy* court's apparent conclusion that there is no connection between the compulsory license scheme and the Commission's must-carry rules. *Quincy*, 1768 F.2d at 1454, in. 42. See also, Comments of the *National Telecommunications and Information Administration* at p. 18, n. 30; Comments of *Association of Independent Television Stations, Inc.*

cultural television fare—stands to lose carriage of many of its stations.

In sum, I regret that we have not adopted broader must-carry rules; the experimental course we have chosen seems still inadequate to redress the critical marketplace imbalances fostered by the *Quincy* decision. Nevertheless, our action today provides a much needed transition study period of partial must-carry with ample latitude for cable to exercise First Amendment judgments. I fervently hope that our system of *free* television broadcasting, which serves virtually all of the nation, is not seriously impaired by a misguided effort to preserve alleged First Amendment right of a monopoly program distribution *pay* service that serves less than half of our citizens.

STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

Re: *Report and Order in MM Docket No. 85-349*

I fully subscribe to the *Report and Order's* finding that the advent of a burgeoning nonbroadcast video programming industry warrants a fundamental redefinition of the federal interest we seek to further through cable television regulation. In adopting the 1984 Cable Act Congress specifically recognized the tremendous contribution to program diversity that satellite-delivered nonbroadcast services have provided.[1] This same recognition is evinced in the *Report and Order*, and constitutes a definitive and welcome affirmation of the proposition that this Commission also has a mandate to make satellite-delivered programming available to the American people that is, in my view, of no less importance than the mandate for broadcast television embodied in Section 307(b) of the Act.

Creating a competitive balance between terrestrial broadcasting and satellite-delivered nonbroadcast programming for purposes of cable carriage is significant,m but in my view it constitutes only a modest first step towards remedying the disequilibrium that results from current federal policies that may give cable television an unwarranted competitive edge in the program delivery market and to skew the program diversity that might otherwise develop in a totally free market.

There are several policies accountable for this remaining disequilibrium. There is, for example, the compulsory copyright license that cable enjoys for retransmission of distant broadcast signals.[2] The compulsory license precludes broadcasters and other program producers from negotiating and selling the rights to their own product, instead

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[1] H. Rept. 98-934, 98th Cong. 2d Sess. 1984, at 21.

[2] Copyright Revision Act of 1976, 17 U.S.C. Sec. 1 *et seq.*

allowing cable systems to take broadcast product for what appears to be a fraction of its real value on the open market. By thus allowing cable to fill channels cheaply with existing broadcast programming the compulsory license may inhibit the increased production of new cablecast and broadcast programming, thereby resulting in an overall diminution in the amount of program diversity that might otherwise be achievable. As a majority of the Commission stated at the time of the *Quincy* decision, "the mass media marketplace will not be set entirely right until cabled's copyright immunity is replaced with a scheme of full copyright liability, allowing unimpeded negotiations between the parties."[3] It follows that program diversity will not be truly maximized unless and until the current compulsory copyright license is reexamined.[4]

Exacerbating the negative effects of the compulsory license is the absence of distant signal carriage restrictions and syndicated program exclusivity rules, deleted by the Commission in 1980.[5] In particular the syndicated program exclusivity rule was intended to function as a copyright surrogate.[6] There has been considerable debate over the extent to which the legislative history of the Copyright Revision Act evinced an intent that these rules not be

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[3] *Statement of Chairman Fowler and Commissioners Dawson and Patrick re Appeal of Quincy Cable TV, Inc. v. FCC*, August 2, 1985.

[4] See generally *Cable Retransmission of Broadcast Television Programs Following Elimination of the "Must - Carry" Rules*, a report issued by the Office of Policy Analysis and Development, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, 1985.

[5] *Report and Order in Docket Nos. 20988 and 21284*, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite TV of New York v. FCC*, 652, F. 2d 1140 (2d Cir. 1981).

[6] *See e.g., Report in Docket No. 20988*, 71 FCC 2d 951, 962, 976-77 (1979); *Report and Order in Docket Nos. 20988 and 21284, supra n. 5*, at 748.

abolished by the Commission.[7] It appears that the Congress, and thus the Copyright Revision Act, may have anticipated that the Commission might fine-tune these rules but not jettison them altogether.[8] This possibility calls for us to carefully reexamine the effect of the rules' deletion on the operation of the Copyright Revision Act.[9]

The practice of granting monopoly franchises to cable system operators is another government policy that not only unbalances competition but also raises serious First Amendment concerns. As recognized—indeed, acquiesced in[10]—by the Commission, [c]able television service has tended to develop on a noncompetitive, monopolistic basis in the areas served. The normal protection afforded consumers by providing a choice between alternative suppliers has not, in most instances, been available to cable television subscribers.[11]

Exacerbating the monopoly franchise problem is the proscription against local exchange carriers' "provid[ing] video programming directly to subscribers in [their] own

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[7] *See, e.g., Cable Copyright Liability: Alternatives to the Compulsory License*, by Mark M. Bykowsky et al., NTIA, U.S. Department of Commerce, 1982, 21-27.

[8] *Id.* at 27.

[9] Another way of approaching this issue would be to reexamine whether readoption of either or both the syndicated exclusivity rules and some form of distant signal carriage restriction might perhaps be warranted. I would certainly be open to this approach and took forward with particular interest to reviewing the relevant legal and factual analyses that may be presented in this context.

[10] In adopting its comprehensive regulatory program for cable television in 1972, The Commission elected to retain the current system of locally granted monopoly franchises. *Cable Television Report and Order*, 36 FCC 2d 143, 207-08 (1972).

[11] *Amendment of Part 74 of the Commission's Rules*, 15 FCC 2d 417, 425 (1968).

service area[s]."[12] I would hope that the Commission will now move with dispatch in releasing he inquiries into these subjects as outlined at Paragraph 213 of the *Report and Order.*

The effect of these governmentally created or condoned policies may well be to artificially restrict competition between cable systems and broadcast stations—indeed? between cable systems and anyone else. In this sense, government policy has helped to create the potential for cable to "bottleneck" reception of off-air and satellite programing. Depending on several factors, including the number of available off-air signals and the consumer's ability to receive video programming adequately without cable television service, the cable bottleneck can cross the line from potential to real.[13]

I support the adoption of the interim must-carry rules because they afford the cable operator greater programming discretion without causing enormous dislocations in the current environment. However, in light of what I view as the *Quincy* court's clear instruction,[14] my preferred

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[12] This proscription is contained in Section 613(b)(1) of the 1984 Cable Act, and reflects the same cross-ownership restriction appearing in the Commission's Rules. Local television station licensees are likewise precluded under the Cable Act from owning cable systems within their stations' Grade B contours, 47 U.S.C. Section 613(a).

[13] Indeed, the possibility that unrestricted multiple ownership system ownership may measurably enhance cable's bottleneck aspect has prompted the Commission to specifically examine the issue in Gen. Docket No. 86-836.

[14] The *Quincy* opinion seems quite explicit on this point. "The Commission must make some effort to move beyond the amorphous in defining the interest served by the must-carry rules." Id. at 1461. Moreover, on the need for any must-carry rule to be tailored so as to assure the achievement of our articulated goal, the court was equally specific: "[I]n the administrative context O'Brien's substantial interest test 'translates . . . into a record that convincingly shows a problem to exist' . . . in the context of this case the question becomes whether the

course of action would have been to institute proceedings patterned after those conducted in the *Economic Inquiry*[15] right now.

I believe the information we need to conduct the necessary factual analyses and econometric studies is largely either available or readily obtainable. Having factual knowledge in a timely fashion would at least have the benefit of producing in concrete form a showing of whether any must-carry rules at all are warranted and, if so, where and to what extent. Admittedly, this approach is not perfect, but it would appear preferable to delaying rulemaking proceedings of any kind for several years.

I would perhaps be more inclined to defer ultimate rulemaking if I had more confidence that the input selector (A/B) switch and consumer education program we adopt today would ultimately solve the must-carry problem satisfactorily. Unlike my colleagues, however, I am not convinced that the regulations the Commission has adopted today will achieve what they are intended to achieve; in fact, I believe they will have quite the opposite effect. For in the guise of deregulating cable television, I fear the Commission will only have succeeded in re-regulating the cable industry.

It is difficult to recall when in recent history this Commission has imposed a set of conduct-regulating rules so overbearingly specific in nature. Thus, for example, the rules state that The system operator "shall" supply to each new subscriber an A/B switch. Existing subscribers are

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Commission has adequately proven that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable." Id. at 1454-55, citation omitted.

[15] *E.g., Inquiry into the Economic Relationships Between Television Broadcasting and Cable Television*, 65 FCC 2d 9 (1977); *Economic Inquiry Report*, 71 FCC 2d 632 (1979); *Report in Docket No. 20988, supra; Notice of Proposed Rulemaking*, 71 FCC 2d 1004 (1979), *Report and Order in Docket Nos. 20988 and 21284, supra.*

treated only a little less heavy-handedly, depending on your perspective. Although they are allowed to decline the initial switch offer, the rules specify that they must be re-offered switches, in writing, once a year, every year, until either they give in or the interim rules expire, whichever occurs first. The rules also provide a text for the annual switch offer, complete with boxes to check indicating whether the subscriber wishes the switch installed or wants to install it himself. Finally, once a year, every subscriber has to be advised in writing that in 1986 the Commission changed the must carry rules; that not all local signals, or ultimately *any* local signals, may have to be carried; that the subscriber needs a switch; that the subscriber may need an antenna; what the switch is and how it works; and any local signals that are not currently carried.

The rules we adopt go into excruciating detail on consumer's rights. To label these insistent consumer advisories "cable *Mirfanda* warnings" does not do them justice: a closer analogy would be the traditional *Miranda* warning coupled with an informative lecture on the American criminal justice system. And although I would support regulations aimed simply at *encouraging* subscribers to use switches, this anachronistic throwback to the days of regulatory micromanagment casts much too large a federal shadow for me to accept.[16]

Remarkably, despite the detail of the regulations which we adopt, the rules may also create a good deal of uncertainty regarding cable systems' responsibilities. For example, although the rules prescribe in detail how and when switches shall be offered, they fail to provide any exemp-

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[16] Even at their regulatory zenith, the 1972 cable television rules never required cable system operators to explain to subscribers annually or any other way why, for example, the syndicated program exclusivity rules required the deletion of certain programs on certain stations, or why the sports exclusivity rules sometimes require that games on distant stations be blacked out.

tion for those systems serving areas where, due to terrain or other factors, no off-air service is available in the first place. Similarly, although the rules prescribe that switches have to meet the technical standards of Section 15.606(a) of the Rules to prevent harmful signal leakage, they provide no clue as to how the system operator is expected to definitively assure that subscriber-installed switches do not leak due to defective installation or subsequent adjustment. Nor do they indicate whether the operator is responsible for post-installation repair and similar service calls and if so under what circumstances. Finally, and most critically, although the rules recognize the critical importance of antennas in making receivable the off-air signals that the switch makes available, the *Report and Order* glides glibly, and in my view inaccurately, over the conceded nonprevalence of outdoor antennas and its likely impact on the success of the switch program.

In sum, I fear that these rules may give cable systems and consumers elements that are the worst of both worlds. On the one hand, the conduct of the system operator is micromanaged and the discretion of the cable subscriber is substantially restricted; on the other hand, the Commission has left substantial room for interpretation and reinterpretation. I sincerely hope that interested parties will not argue on reconsideration that, having required switches, we must now also move on to a federal program to provide outdoor antennas. That, to me, captures the problem with new Section 76.66: it almost inevitably results not in a satisfactory solution to the problem at hand, but rather in spawning a series of seemingly endless reinterpretations, clarifications, waivers, and the like. I short, micromanagement usually begets yet more micromanagement.

I am terribly concerned that the only thing the Commission will have done by its action today is to create tremendous confusion, uncertainty and costs for cable operators, cable subscribers, and broadcasters, and that this

unintended creation will drag us inexorably even further down a micromanagement path we have in virtually all other contexts heretofore declined to travel. Nor is this result simply a matter of philosophical handwringing. Far from it. For the total costs of implementing the input selector switch and consumer education program, including the costs to consumers of purchasing antennas, is estimated to cost from $483 million to over $1.6 billion. This would be an absolutely staggering burden to impose for any reason. In the context of this case, however, it would be imposed notwithstanding the program's substantial shortcomings and, perhaps worst of all, without even having first conducted proceedings designed to show whether or under what circumstances *any* prophylactic rules assuring cable subscribers' access to local broadcast programming are even warranted. The cable industry and, ultimately, cable consumers should not be asked to pay for what may in large measure be a nonsolution to a nonproblem.[17] I am simply not yet convinced that the "misperception" problem is the consumer's rather than the Commission's, or that we have a workable way of solving it.

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[17] In this regard I would also note that the costs of implementing this program would be passed along to subscribers shortly after basic subscriber rates are deregulated on January 1, 1987.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 87-105
37021

In the Matter of	)	
	)	
Amendment of Part 76 of the	)	MM Docket
Commision's Rules Concerning	)	No. 85-349
Carriage of Television Broadcast	)	
Signals by Cable Television Systems	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1987 Released: May 1, 1987

By the Commission: Commissioner Quello concurring in part and dissenting in part and issuing a statement.

TABLE OF CONTENTS

INTRODUCTION

1. Before the Commission are thirty Petitions for Reconsideration of its *Report and Order* in the above-captioned proceeding (*Report and Order*), adopted August 7, 1986, 1 FCC Rcd 864 (1986).[1] These petitions seek reconsideration of our policy decisions in the following broad categories: 1) the basic decision to implement a two-part regulatory program consisting of input selector switch and interim mandatory signal carriage requirements; 2) the technical standards for input selector switches; 3) the consumer education requirements; and, 4) The specific provisions of the interim must carry rules.

2. Upon consideration of these petitions, we continue to believe that the basic approach of input selector switch and interim must carry requirements is the most appropriate means for resolving the must carry matter. However, we recognize petitioners' arguments that the rules adopted in the *Report and Order* would impose substantial costs on cable operators and would in some cases require switches to be provided in areas with no available off-the-air signals. On further contemplation of this matter, we also are concerned that the input selector switch rules, as adopted, might reduce the flexibility of both cable operators and consumers with respect to the choice of switches that would be most suitable for individual needs or preferences. Accordingly, we are modifying the input selector switch and the associated consumer education requirements to reduce their burden on cable operators and to provide both cable operators and their subscribers with more discretion in the choice of switch options. We also

[1] Eight parties submitted responses either supporting or opposing the petitions for reconsideration, and nine parties filed replies to the responses. Appendix A provides a complete list of the parties filing petitions, responses/oppositions and replies concerning any aspect of the *Report and Order* or the issues raised in the requests for reconsideration.

are modifying certain provisions of the interim must carry rules to improve their effectiveness in achieving our objective in the least intrusive manner.

3. *Overview of the Must Carry Decision.* In the *Report and Order,* we determined that the federal interest in the must carry matter is to maximize the video program choices available to consumers. We observed that the federal interest in ensuring access to the maximum program choices includes ensuring access to the service of noncommercial educational television stations. We also recognized that any regulations we may consider in furtherance of our goal to maximize the availability of program choices by competing providers of video services, both off-the-air and on cable, must be weighed in terms of their impact on cable operators' and programmers' First Amendment rights.

4. With respect to the need for regulation, we stated that "because cable subscribers have not perceived the need to maintain or install antennas and input selector switches, their access to off-the-air broadcast signals is limited to those carried by the cable system to which they subscribe."[2] This perception derives not from any inherent characteristic of cable service, but rather from cable subscribers' current expectation that broadcast signals will always be available as part of their cable service. We further found that this expectation is a direct result of the former must carry rules, which required cable systems to carry all available off-the-air television signal. We observed that this expectation has caused many subscribers to believe that there is no need to install or maintain the capability to receive broadcast signals off-the-air. When consumers subscribe to cable service, they tend to disconnect, and in most cases dismantle, their antennas. We concluded that because of this misperception, many cable

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[2] *Report and Order, supra* at 881.

subscribers do not have independent off-the-air reception capability and, thus, ar not able to view available off-the-air broadcast signals not carried by their cable systems. In this regard, we found that there is ample evidence that cable penetration nationwide has reached a level where there is potential for this problem to affect a substantial portion of the population.

5. We determined that the misperception resulting in consumers' current practices respecting connection of their television sets to cable service is inimical to the public interest. In this regard, it tends to frustrate our federal objectives of maximizing program choices and promoting a fair and open competitive market environment that will produce programming that meets viewers' interests and preferences. Thus, we concluded that regulation is necessary to correct the undesired effects of our former must carry rules. We further concluded that this regulation must be designed to give viewers the capability to preserve and reestablish their independent access to the available off-the-air program choices in a manner that is least intrusive on the First Amendment rights of cable operators and programmers.

6. In view of the above, we determined that the most appropriate course of action to achieve our federal objective, while keeping First Amendment intrusions to a minimum, is to adopt a plan that will make cable subscribers aware of the need for the capability to access broadcast signals directly off-the-air and will actively assist the development of such capability. We stated that such an approach is consistent with our general belief that market mechanisms are the preferred method for ensuring that the interests of consumers are satisfied. To implement this course of action, we adopted a two-part regulatory program which is designed first to alter existing practices and knowledge with respect to connection of cable service that can render cable subscribers unable to receive broadcast television service and, second, to provide interim must

carry relief t the broadcast television industry during the transition to the new environment in which the connection of cable service would no longer have that effect.

7. Under the first part of our new regulatory program, cable systems are required to provide their subscribers with input selector switches that will enable reception of broadcast signals by means of an antenna. In addition, cable systems are required to implement a consumer education program to inform their subscribers of the purpose of, and need for, maintaining off-the-air reception capability. The second part of our program consists of interim must carry rules that will expire five years from their effective date.[3]

RECONSIDERATION OF THE BASIC POLICY DECISION

Summary of Petitions

8. Several parties request that we reconsider our basic policy decision to resolve the must carry matter through the two-part regulatory program adopted in the *Report and Order*. These parties submit varying arguments claiming that this program does not adequately ensure the preservation of the public interest with respect to the availability of broadcast television signals to cable subscribers or that it violates constitutional and/or statutory provisions, and they offer alternative plans intended to rectify its alleged deficiencies. Below is a summary of each of these requests for reconsideration of the general approach of our basic policy decision.

9. The National Cable Television Association (NCTA), the Community Antenna Television Association (CATA),

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[3] On December 24, 1986, we issued an *Order* staying the effective date of the new rules. In the *Order*, we also indicated that this stay would remain in effect until 30 days after the release of the instant *Memorandum Opinion and Order* addressing petitions for reconsideration filed in this proceeding. *See Order*, released December 24, 1986, FCC 86-575.

and the National Association of Broadcasters (NAB) [Joint Petitioners] filed a joint petition contending that the input selector switch rules are unworkable and contrary to the public interest. Their request for reconsideration is supported by Tele-Communications, Inc., TKR Cable Company, and TCI-Taft Cablevision Associates in a separately filed joint petition. Joint Petitioners argue that the input selector switch requirements will not provide an effective means of ensuring that cable subscribers have access to off-the-air television signals. They submit that any benefits of the input selector switch approach will be more than offset by increased costs and technical problems. Joint Petitioners also argue that the Commission made its decision in a vacuum since it did not put forward its specific regulatory approach for public comment. They include with their petition a report prepared by the NCTA Engineering Committee that addresses the costs and technical considerations associated with input selector switches intended for use with cable service.

10. Joint Petitioners argue that the implementation of the input selector switch requirements would be prohibitively expensive. In this respect, they observe that the NCTA report indicates that the cost of the switches and associated hardware alone would be nearly $1.4 billion. They further state that the additional costs of antennas and labor to install the switches would increase the total expenditures necessary to comply with the new rules by billions of dollars. NCTA estimates that, purchased in quantity, the price of individual switches will be between $2.50 and $4.50, and the cost of necessary connecting hardware for each switch will be $1.75. They conclude that the per subscriber equipment cost will be a minimum of $5.00 and that in complex installations (with VCR's) the cost will be $10.00 per subscriber. On an industry-wide basis, NCTA estimates that the initial capital costs of complying with the switch requirements will exceed $860 million during the next five years. They also estimate that

the cost of replacing switches that malfunction will cost an additional $540 million.

11. Joint Petitioners cite three "serious technical problems" which they feel will arise from the input selector switch rule. First, they contend that significant signal leakage will occur. Citing the NCTA study, they claim that "in many cases" switches sent to subscribers for self-installation will be connected incorrectly. As a result, cable signals will be radiated over the subscriber's antenna at high gain, threatening harmful interference with other services, including those serving commercial aviation. Second, they state that signal quality degradation will result due to poor isolation between the A and B sides of switches.[4] Finally, they maintain that the use of input selector switches would render ineffective certain unspecified features of subscribers' TVs, VCRs, and cable converters, and would make it more difficult to connect peripheral equipment such as video games, computers and stereo decoders. The NCTA study contends that, while the Commission noted in the *Report and Order* that these problems can be overcome by minor equipment modifications and by the increase in sets with built-in switches, the development of a readily available solution does not appear imminent. NCTA declares that, currently, technologies used in electronic switching devices are not practically transferable to stand alone devices and that it will be years before an

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[4] Isolation is the ability of the "A" input side of the switch to discriminate and resist incursion of signals from the "B"' input side, and visa versa. According to NCTA, poor isolation makes it impossible to watch programming from one of the two sources without noticeable interference from the other. Joint Petitioners contend that an input selector switch used for selecting between broadcast and cable service must provide at least 90 dB of isolation to protect against signal degradation. They claim that such switches are more expensive than switches offering lower isolation that are suitable for use in conjunction with computers and other peripheral video devices. Joint Petitioners also state that isolation levels deteriorate rapidly after switches are placed in service.

appreciable number of TV sets with built-in switches are on the market. NCTA admits that built-in electronic switches do not suffer from the interference, degradation, short lifespan, and other problems of mechanical input selector switches.[5] By that time, NCTA observes, a great amount of technically deficient switches will be in home use.

12. Finally, Joint Petitioners contend that compliance with the input selector switch rules will not provide any appreciable public benefits. They argue that most of the switches will not be used for reasons that include inconvenience to the subscriber and subscriber lack of an antenna capable of providing adequate off-the-air reception. Joint Petitioners also claim that cable subscribers will have no need to use a switch because the interim must carry rules will essentially mandate cable carriage of VHF stations that could be received off-the-air and the capability to receive UHF signals off-the air is not affected by the installation of cable service.[6] They contend that as a result of all of the above considerations, input selector switches installed in the interim period will be merely "standby" devices.

13. Joint Petitioners state that the problems with our approach can be overcome by the adoption of a set of continuing signal carriage requirements and elimination of the input selector switch rules. They submit that the simplest and most direct means of ensuring that cable subscribers have continuing access to broadcast programming would be to eliminate the sunset provision to the signal carriage requirements adopted in the *Report and Order*.[7] They state that the limited signal carriage rules we adopted

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[5] *See* Petition by Joint Petitioners, NCTA study, p. 14, n. 6.

[6] Joint Petitioners state that on many receivers, connection of cable service does not disable the receiver's UHF antenna terminals.

[7] *See* 47 CFR §76.64.

represent an appropriate basis for ongoing signal carriage requirements.

14. In the event we are unwilling to accept their principal proposal, Joint Petitioners recommend an alternative approach that would allow cable operators to choose between input selector switches and signal carriage regulation. Under this plan, cable systems would be subject to signal carriage regulation for five years. At the end of this period, or any time thereafter, a cable system would be permitted to elect not to carry all signals required by the must carry rules, but only if it had been installing input selector switches and providing related information to all new subscribers and offering switches to existing subscribers for the previous five years. In addition, a system exercising this option would be required to continue to provide switches and related information to all new subscribers for as long as it seeks to be exempted from signal carriage regulation.

15. Joint Petitioners state that this elective approach differs from the rules adopted in the *Report and Order* in a way that further enhances the discretion of cable operators by giving them the opportunity to determine the time and circumstances in which initiation of the input selector switch and information requirements will best serve the needs of their subscribers. They further submit that under this plan, the direct and indirect costs to the public are likely to be significantly less than those of mandatory switch rules, and that the technical difficulties associated with currently available switches also would be avoided or reduced.

16. Adelphia Communications Corporation, filing jointly with eighteen other cable interests (Adelphia), also requests reconsideration of the input selector switch requirements. Adelphia argues that these rules are unconstitutional for three reasons. First, it claims that,

using the standard articulated in *U.S. v. O'Brien*,[8] the Commission has failed to demonstrate that the new rules further a substantial federal interest. Adelphia states that the Commission offers little evidence to demonstrate the existence of the alleged problems which would justify the need for further must carry regulation and no evidence at all to support the conclusion that the use of input selector switches will further the asserted governmental interest of maximizing consumer choice. Second, Adelphia submits that the Commission has failed to demonstrate that the new interim rules are the least burdensome alternative available to achieve any substantial federal interest. Adelphia states that a consumer education program alone, without the input selector switch, would be sufficient to achieve the Commission's asserted regulatory goals, and that the Commission has failed to show otherwise. Finally, Adelphia argues that the input selector switch requirements are overbroad for three reasons: 1) they fail to provide an exemption in cases where the input selector switch would serve no purpose (for example, in situations where all local VHF broadcast stations are carried on a local cable system or where no local VHF signals are receivable off-the-air in the cable system area); 2) they should not be applied to new subscribers, since only previously existing subscribers would suffer from the misperception that local broadcast signals cannot still be received through external antennas; and, 3) input selector switches should not be mandatory, but rather optional.

17. Adelphia further contends that the input selector switch requirement violates several provisions of the Cable Communications Policy Act of 1984 (Title VI of the Communications Act). Adelphia claims that the economic burden imposed upon cable operators by the input selector switch rule and the Commission's prevention of cable op-

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[8] 391 U.S. 367, 377 (1986). For further discussion of this constitutional standard, *see infra* at paragraph 63, n. 19.

erators from itemizing the cost of providing an A/B switch on its subscriber billings contravenes national cable communications policy: 1) by ignoring statutory recognition in Section 622 of the Cable Act of the right of cable operators to pass on the costs of regulation to subscribers; 2) by constituting a form of rate regulation prohibited under Section 623 of the Act; and, 3) by imposing a new requirement regarding the content of cable services prohibited by Section 624 of the Act.

18. Like the Joint Petitioners, Adelphia contends that numerous technical problems could result from imposition of the input selector switch rule established in the *Report and Order*. Adelphia states that signal degradation will result because few input selector switches will provide adequate isolation of off-the-air and cable signals, and because the life expectancy of input selector switches is uncertain. Further, Adelphia argues that the use of an input selector switch threatens signal leakage if it is improperly or insecurely installed or if loose fittings occur, thereby forcing unnecessary and expensive service calls. Adelphia notes that at present it is unclear who would ultimately bear the financial burden for those calls, the cable operator or the consumer. Further, it states that other problems associated with so-called "addressable converters" could occur, such as interruption of information flow and automatic disabling of the system. Adelphia also contends that input selector switches present a problem in channel tuning, in that when a cable subscriber switches to off-the-air reception, reception may not be fine-tuned. Moreover, it believes that the complex installation of these switches will increase subscriber confusion and frustration. Finally, Adelphia states that input selector switches will be useless to those subscribers who do not have off-the-air antennas.

19. Turner Broadcasting System, Inc. (TBS), Century Communications Corp., filing jointly with sixteen other cable interests (Century), and the California Cable Television